EDITOR'S NOTE

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ptember 25, 1985

Title: Otis R. Bowen, Secretary of Health and Human Services, et al., Appellants
v.
Public Agencies Opposed to Social Security Entrapment, et al.

Court: United States District Court for the Eastern District of California

Counsel for appellant: Solicitor General

Counsel for appellee: Kobayashi,Charles C., Schulkze,Ernest F.

try	Date	Note	Proceedings and Orders
1	Aug 15 1985		Application for extension of time to docket appeal and order granting same until September 25, 1985 (Rehnquist, August 19, 1985).
2	Sep 10 1985		Application for further extension of time to docket appeal denied (Rehnquist, September 12, 1985).
3	Sep 25 1985	G	Statement as to jurisdiction filed.
5	Oct 17 1985		Order extending time to file response to jurisdictional statement until November 11, 1985.
6	Nov 8 1985		Motion of appellee California to dismiss or affirm filed.
7	Nov 12 1985		Motion of appellee Pub. Agencies Opposed to Soc. Security Entrapment,et al. to dismiss or affirm filed.
8	Nov 13 1985		DISTRIBUTED. November 27, 1985
9	Dec 2 1985		PROBABLE JURISDICTION NOTED.
			**********
1	Jan 15 1986		Order extending time to file brief of appellant on the merits until January 30, 1986.
2	Jan 27 1986		Joint appendix filed.
3	Jan 31 1986		Brief of appellants Bowen, Sec., H&HS, et al. filed.
5	Feb 14 1986		Order extending time to file brief of appellee on the merits until March 17, 1986.
7	Feb 18 1986		Order extending time to file brief of appellee on the merits until March 17, 1986.
8	Mar 14 1986		SET FOR ARGUMENT, Monday, April 28, 1986. (3rd case)
9	Mar 17 1986		Brief of appellee California filed.
0	Mar 17 1986		Brief amicus curiae of Council of State Governments, et al. filed.
1	Mar 19 1986		Brief of appellee Public Agencies Opposed to Soc filed.
2	Mar 20 1986	D	Motion of appellees Public Agencies Opposed to Social Security Entrapment, et al. for leave to file out-of-time motion for divided argument filed.
3	Mar 24 1986		CIRCULATED.
4	Mar 31 1986		Motion of appellees Public Agencies Opposed to Social Security Entrapment, et al. for leave to file out-of-time motion for divided argument DENIED.
5	Mar 28 1986		Record filed.
6	Mar 28 1986		Certified copy of original record, 1 box, received.
7	Apr 21 1986	X	Reply brief of appellants Bowen, Sec., H&HS, et al. filed.

85-521-ADX

ry	Date	Note	Proceedings and Orders
	Apr 28 1986		ARGUED.

85-521

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

STATE OF CALIFORNIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

CHARLES FRIED
Acting Solicitor General

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Acting Assistant Attorney General

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QUESTION PRESENTED

Whether Section 103(a) of the Social Security Amendments Act of 1983, 42 U.S.C. (Supp. I) 418(g), effected a "taking" of property within the meaning of the Fifth Amendment by preventing states from withdrawing from the Social Security System.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, plaintiffs in the district court were the Yorba Linda Library District, the North Bakersfield Recreation and Park District, the Delano Mosquito Abatement District, Katherine T. Citizen, William Rasmussen, and Margie Hunt. Defendants in the district court included, in addition to the parties named in the caption, John Svahn. Named as "real parties in interest" were George Deukmejian, Michael Franchetti, the Board of Administration of the Public Employees Retirement System of the State of California, Robert F. Carlson, Bill D. Ellis, Jake Petrofino, Prescott R. Reed, Wilson C. Riles, Jr., Mel Reuben, Jack G. Willard, Brenda Y. Shockley, and Susan Tohbe.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

STATE OF CALIFORNIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-35a) is reported at 613 F. Supp. 558.

JURISDICTION

The judgment of the district court (App., *infra*, 36a) was entered on May 31, 1985. A notice of appeal (App., *infra*, 37a-38a) was filed on June 27, 1985. On August 19, 1985, Justice Rehnquist extended the time for docketing the appeal through September 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. 418(a)(1) provides in relevant part:

> The Secretary of Health and Human Services shall, at the request of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this subchapter to services performed by individuals as employees of such State or any political subdivision thereof.

42 U.S.C. (Supp. I) 418(g) provides:

> No agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983.

42 U.S.C. 1304 provides:

> The right to alter, amend, or repeal any provision of this chapter is hereby reserved to Congress.

The Fifth Amendment to the Constitution provides in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

STATEMENT

1. The Social Security Act, 42 U.S.C. (& Supp. I) 301 *et seq.*, exempts state and local government employees from mandatory participation in the Social Security System (the System). 42 U.S.C. 410(a)(7). In 1950, however, Congress amended the Act to permit the states to enroll their employees, and those of their political subdivisions, in the System. Social Security Act Amendments of 1950, ch. 809, § 106, 64 Stat. 514, codified at 42 U.S.C. (& Supp. I) 418. Specifically, Section 418 authorizes the Secretary of Health and Human Services (the Secretary), "at the request of any State, [to] enter into an agreement with such State for the purpose of extending the [Social Security] insurance system * * * to services performed by individuals as employees of such State or any political subdivision thereof." 42 U.S.C. 418(a)(1).

Pursuant to these so-called "Section 418 agreements"—which must "contain such provisions, not inconsistent with the provisions of this section, as the State may request" (42 U.S.C. 418(a)(1))—participating states may enroll all, or only limited "coverage groups," of their employees. 42 U.S.C. 418(c). See 42 U.S.C. 418(b)(5). Participating states are responsible for collecting and periodically paying to the Secretary of the Treasury "amounts equivalent to the sum of taxes" that would be due if their employees (or those of their political subdivisions) otherwise were covered by the Act (42 U.S.C. (Supp. I) 418(e)(1)(A)), and the other requirements imposed upon the states generally are the same as those placed on private employers by the Act. See 42 U.S.C. 418(i). The Secretary of Health and Human Services may impose penalties for late payment. 42 U.S.C. 418(j). The statute also makes

provision for the assessment of amounts due (42 U.S.C. 418(q)), for the administrative determination of challenges to assessments and claims for refunds (42 U.S.C. 418(s)), and for judicial review of such determinations (42 U.S.C. 418(t)).

Following enactment of Section 418, all 50 states executed agreements with the Secretary to obtain Social Security coverage for their own employees or for those of their political subdivisions.[1] And the percentage of state and local employees enrolled in the System through Section 418 agreements increased dramatically, from 11% in 1951 to 70% in 1970. Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 2d Sess., *WMCP: 97-34, Termination of Social Security Coverage for Employees of State and Local Government and Nonprofit Groups* 25 (Comm. Print 1982) [hereinafter cited as H.R. Comm. Print 97-34]. The percentage of such employees covered by Section 418 agreements has remained roughly constant since then (see H.R. Comm. Print 97-34, at 25); as of 1983, some 9.4 million of the approximately 13.2 million state and local government employees were participants in the Social Security System. H.R. Rep. 98-25, 98th Cong., 1st Sess. Pt. 1, at 17 (1983).

2. As originally enacted, Section 418 provided that a participating state could elect to terminate its Section 418 agreement, in whole or in part, upon two years' notice to the Secretary. 42 U.S.C. 418(g).[2]

[1] Only five states—Alaska, Maine, Massachusetts, Nevada, and Ohio—currently do not have their own employees enrolled in the Social Security System. See H.R. Rep. 98-25, 98th Cong., 1st Sess. Pt. 1, at 17 (1983).

[2] States alone were given the authority to file notices of withdrawal, although they could do so on behalf of local governments.

During the statute's first two decades of operation, virtually no states or subdivisions chose to withdraw from the System. H.R. Rep. 98-25, *supra*, at 18; H.R. Comm. Print 97-34, at 26.[3] From 1977 on, however, the number of withdrawals increased significantly. Between 1977 and 1981, 96,000 state and local government employees were withdrawn from the System; by 1983, termination notices were pending for 634 state and local entities representing an additional 227,000 employees. H.R. Rep. 98-25, *supra*, at 18.

In that year, Congress determined that the continued and accelerating withdrawal of employees by states and localities was threatening the integrity of the Social Security System. It noted that withdrawals at the current rate would cost the Social Security trust funds $500 million to $1 billion annually. H.R. Comm. Print 97-34, at 13-14. And it concluded that permitting states and localities to terminate Social Security participation for their employees was inequitable both for the workers who lost coverage and for the employees who continued to pay into the system. H.R. Rep. 98-25, *supra*, at 18-19.

As part of the Social Security Amendments Act of 1983, Pub. L. No. 98-21, § 103(a), 97 Stat. 71, Congress accordingly amended Section 418(g) to provide that "[n]o agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983."[4]

[3] Indeed, from 1950 through 1966, 23 public entities representing a total of only 319 employees withdrew from the System. H.R. Comm. Print 97-34, at 26.

[4] Prior to this amendment, the Secretary was authorized to terminate a Section 418 agreement upon finding that the state involved was unable to comply with the agreement or with the Act. 42 U.S.C. 418(g)(2). The statute also provided that

This amendment prevents a state from withdrawing its employees from (or those of its political subdivision) from the Social Security System even if a two-year termination notice had been filed prior to 1983 and was pending at the time that Section 418 was modified.[5]

3. At the time of the 1983 amendment to Section 418(g), appellee State of California—which has had a Section 418 agreement with the Secretary since 1951 (App., *infra*, 4a)[6]—had filed termination notices on behalf of approximately 70 of its political subdivisions with some 34,000 employees.[7] Those

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an agreement, once terminated, could not be renewed. 42 U.S.C. 418(g)(3). Both of these provisions were eliminated by the 1983 amendment.

[5] Prior to 1983, employees of certain types of nonprofit organizations were excluded from the Social Security System unless the employing organization filed a certificate waiving its exemption from the System. 42 U.S.C. 410(a)(8)(B). Pursuant to such waivers, approximately 80% to 90% of the 5.3 million employees of nonprofit organizations participated in the System. H.R. Rep. 98-25, *supra*, at 15. Like state governments, however, nonprofit institutions were permitted to withdraw from the System upon two years' notice, and in 1983 termination notices were pending for 977 such organizations with 322,600 employees. In 1983, Congress accordingly made coverage for such employees mandatory by including them within the Act's basic definition of "employee." See Pub. L. No. 98-21, § 102(a)(1), 97 Stat. 70.

[6] California in turn enacted legislation permitting it to enter into agreements with public agencies that wished to participate in the System; these entities were to contribute their share of contributions to the State, and were to be permitted to ask the State to withdraw them from the System upon two years' notice to the State. See App., *infra*, 5a.

[7] The State did not seek to withdraw its own 100,000 employees from the System.

employees were to have been withdrawn from the System at the end of the year. The 1983 amendment, however, prevented the notices from taking effect.

In response to this development, these suits were brought in the United States District Court for the Eastern District of California to challenge the validity of amended Section 418(g). The first action was filed by one set of appellees—several public agencies of the State of California, their employees, local taxpayers, and a group called "Public Agencies Opposed to Social Security Entrapment" (POSSE)—who contended, in part, that the amendment deprived them of their contract rights without according them due process or just compensation. App., *infra*, 9a-10a. The second suit was filed by the State of California, which claimed that Section 418(g) infringed the State's contract and violated the Tenth Amendment by impairing the State's ability to structure its relationships with its employees. App., *infra*, 10a-11a. Both sets of appellees sought injunctive relief.

The district court ruled for appellees.[8] In the court's view, Section 418 agreements are contracts and thus "property" within the meaning of the Fifth Amendment's Takings Clause. App., *infra*, 20a, 30a-31a. Similarly, the court found that the ability to terminate an agreement on two years' notice, which appeared in the original version of Section 418(g) and was echoed in California's Section 418 agreement (see App., *infra*, 4a-5a), "is a contractual right running in favor of the public agencies." *Id.* at 21a. While the court assumed that Congress would have

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[8] The court first ruled that it had jurisdiction, finding that all of the appellees had standing and that the Anti-Injunction Act, 26 U.S.C. 7421(a), was inapplicable. App., *infra*, 11a-24a, 26a-28a.

the authority to divest the State of its right to withdraw "if the right existed solely by virtue of the statute," here the ability to withdraw from the Social Security System "draws its independent existence from the plain terms of the contract." The court therefore held that "Congress is simply not free to deprive the State of its contractual right without just compensation." App., *infra*, 31a-32a (footnotes omitted).

Although the district court thus found that the 1983 amendment to Section 418(g) effected a taking of property, it concluded that it was not free to order payment of just compensation or to refer the case to the Claims Court for the award of that relief. The court reasoned that the purpose of the 1983 amendment was to "ensure an adequate financial basis for [the Social Security] system by requiring the states and their public agencies to contribute to the system," so that "requir[ing] the United States to pay just compensation by making the contribution for the public agencies is simply and clearly contrary to the will of Congress." App., *infra*, 34a. The court therefore declared the amendment void, and ordered the Secretary to "accept the notifications of withdrawal properly tendered to her." *Id.* at 35a.

THE QUESTION IS SUBSTANTIAL

The district court has invalidated a central portion of a legislative package that was designed to "assure the solvency of the Social Security Trust Funds" while correcting a significant "inequit[y]" in the Social Security System. H.R. Rep. 98-25, *supra*, at 1, 18. The importance of its decision is manifest. It will have an immediate effect on the 227,000 state and local government employees whose employers attempted to withdraw from the System as of 1984;

if their coverage is terminated, a great many of these employees will be left with inadequate pension and insurance guarantees, while others—whose rights in the System already have vested—will obtain windfall payments. Similarly, the decision may affect the pension rights of more than 9 million other state and local government employees, whose participation in Social Security (under the district court's ruling) may be terminated upon two years' notice at the election of their employers. And the financial impact on the System of the district court's decision is immense: if withdrawals are permitted to continue at their current pace, the Social Security trust funds will lose between $500 million and $1 billion annually (H.R. Comm. Print 97-34, at 13-14), with an aggregate loss of well over $3 billion for the 1983-1989 period. S. Rep. 98-23, 98th Cong., 1st Sess. 154 (1983). Because the decision below misreads Section 418 and misapplies the law of "takings," plenary review by this Court plainly is warranted.[9]

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[9] Appellees asserted that the district court had jurisdiction under 28 U.S.C. 1331, 1346, 1361, 2201 and 2202; the court assumed jurisdiction over the claims of all appellees without identifying the jurisdictional basis. In our view, however, jurisdiction to challenge implementation of the Act must be provided by the Act itself. See 42 U.S.C. 405(h); *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 11-12; *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975) Cf. *Brown* v. *GSA*, 425 U.S. 820 (1976). Here, that jurisdiction is provided as to California by 42 U.S.C. 418(t), which permits state participants in the System to challenge the Secretary's determinations about amounts owed. California clamed that it had a right to withdraw certain employees from the System, and thus to cease making contributions on their behalf; the Secretary denied that claim. The Secretary has treated this exchange as a final decision on a challenge to an assessment, and

1. The district court grounded its holding on the assumption that Section 418 agreements represent run-of-the-mill contractual relationships between the state and federal governments, with each side holding vested property rights. That assumption, however, fundamentally misunderstands the nature of Section 418 and of the agreements consummated under its authority.

Section 418 agreements do not involve arms-length negotiation with each side attempting to obtain the "benefit of the bargain"; instead, Congress created the agreement mechanism simply as a convenient method of making the benefits of enrollment in the Social Security System available to state and local government employees. See S. Rep. 1669, 81st Cong., 2d Sess. (1950). Section 418 thus constitutes a social welfare program essentially universal in its application, rather than "a contractual arrangement." *National Railroad Passenger Corp.* v. *Atchison, T. &*

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has determined not to insist on further recourse to administrative remedies because no facts are in dispute and "the relief that is sought is beyond [her] power to confer." *Mathews* v. *Eldridge*, 424 U.S. 319, 330 (1976). See *Salfi*, 422 U.S. at 766-767.

While the district court thus had authority to decide the case, we note that none of the POSSE plaintiffs was properly before the court. The individuals could challenge a dispute about application of the Act only under 42 U.S.C. 405(g); because none of them filed a complaint or a request for the correction of records (see 42 U.S.C. 405(c)) with the Secretary, the court lacked jurisdiction to consider their challenge. See, *e.g.*, *Eldridge*, 424 U.S. at 329. And Section 418(t) provides a remedy only for states (which are the only Section 418 employers to deal directly with the Secretary), not for political subdivisions. See note 2, *supra*.

S.F. Ry., No. 83-1492 (Mar. 18, 1985), slip op. 14. And when Congress establishes such a legislative program, "the presumption is that '[it] is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Ibid.* (quoting *Dodge* v. *Board of Education*, 302 U.S. 74, 79 (1937)). See *Rector of Christ Church* v. *County of Philadelphia*, 65 U.S. (24 How.) 300, 302 (1861).

"[L]est there be any doubt in this case about Congress' will" (*National Railroad Passenger Corp.*, slip op. 16), the statute from the outset expressly has reserved to Congress "[t]he right to alter, amend, or repeal any provision of [the Act]." 42 U.S.C. 1304. For over a century, the Court has "recognized the effect of these few simple words" (*National Railroad Passenger Corp.*, slip op. 16 n.22): "through the language of reservation 'Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments * * * as come within the just scope of legislative power.'" *Ibid.* (quoting the *Sinking-Fund Cases*, 99 U.S. 700, 720 (1879)). Legislation containing such a provision hardly can give rise to static property interests.

It is true, of course, that the Section 418 program makes use of written agreements, a consideration that the district court evidently found determinative (see App., *infra*, 31a-32a). But there is no talismanic significance to the existence of a separate writing signed by a representative of the federal government. Congress provided that the states could join the Social Security System by means of individual agreements in an attempt to "*permit*[] [them] to play a

continued role" (*FERC* v. *Mississippi*, 456 U.S. 742, 765 n.29 (1982)) in the pension field; states may enroll certain coverage groups so as to preserve their existing pension systems, and may include in their agreements any provisions that are not inconsistent with the Act. See H.R. Comm. Print 97-34, at 20; S. Rep. 1669, *supra*. Congress reasoned that this approach would "extend coverage as quickly and with as little difficulty as possible to those employees who needed it most." H.R. Rep. 98-25, *supra*, at 19. It would turn this aim on its head, however—and ultimately would disserve state interests—to conclude that attempts to accommodate the states in federal regulatory programs give rise to contractual relationships that make changes in those programs impermissible.

In any event, Section 418 agreements have none of the indicia of typical contracts. Their purpose is not a parochial one related to the self-interest of the parties; instead, the agreements make available to individual workers the benefits of participation in a generally applicable social welfare program. The implementation of the agreements is subject to regulations promulgated by the Secretary. 42 U.S.C. 418(i). And the Act makes provision for administrative and judicial review of challenges to assessments and payments (42 U.S.C. 418(s) and (t)) in a manner that parallels those applicable to most federal programs. Section 418 agreements thus do not create obligations of the sort that have ever been found to be binding on the federal government. Compare, *e.g.*, *Perry* v. *United States*, 294 U.S. 330 (1935); *Lynch* v. *United States*, 292 U.S. 571 (1934).

2. Even if Section 418 agreements are in some sense thought to be contracts, "Congress simply can-

not be presumed to have nonchalantly shed [the] vitally important governmental power" to make basic modifications in the Social Security System through legislative change. *National Railroad Passenger Corp.*, slip op. 17. The district court assumed that Congress has the power to modify Section 418 *itself* to eliminate the *statutory* termination provision, but held that the existence of written agreements freezes the relationship between the United States and state participants in the System (App., *infra*, 31a-32a). The court failed to recognize, however, that "sovereign power even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). See *New York Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573, 590-593 (1938). Thus, "[c]ontractual arrangements remain subject to subsequent legislation by the presiding sovereign * * * unless [the sovereign's ability to enact such legislation] 'has been specifically surrendered in terms which admit of no other reasonable interpretation.'" *Jicarilla Apache Tribe*, 455 U.S. at 147-148 (quoting *City of St. Louis* v. *United Rys.*, 210 U.S. 266, 280 (1908)).

That Congress did not bargain away its authority to modify essential elements of the Social Security System is plain. As noted above, the Act contains an express reservation of congressional authority to modify any of the Act's provisions. And this Court repeatedly has noted that the survival of the System requires

> flexibility and boldness in adjustment to ever-changing conditions * * *. It was doubtless out of an awareness of the need for such flexibility that Congress included in the original Act, and

> has since retained, a clause expressly reserving to it '[t]he right to alter, amend, or repeal any provision' of the Act. That provision makes explicit what is implicit in the institutional needs of the program.

Flemming v. *Nestor*, 363 U.S. 603, 610-611 (1960) (citations omitted). Cf. *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 174 (1980); *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 575 (1979); *Richardson* v. *Belcher*, 404 U.S. 78, 80-81 (1971). It is hardly likely, then, that Congress would have "abandoned its sovereign power" (*Jicarilla Apache Tribe*, 455 U.S. at 146) to adjust, through legislation, the Social Security obligations of state and local employers.[10]

On close examination, in fact, it is evident that Section 418 agreements cannot impose an independent check on Congress's exercise of its sovereign authority. Neither Section 418 nor any individual agreements, for example, contain a provision permitting the United States to terminate the Social Security coverage of state and local government employees. See note 4, *supra*. Yet if Congress were to eliminate the System altogether, it is difficult to imagine that the federal government would be obli-

[10] Even if the situation here is viewed in conventional contractual terms, agreements between the Secretary and the states must be read consistently with controlling provisions of law. *United States* v. *Erika, Inc.*, 456 U.S. 201, 211 n.14 (1982). Those provisions, of course, include 42 U.S.C. 1304. Cf. *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 435 (1934) ("[n]ot only [is] existing law[] read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into [the] contract[] as a postulate of the legal order"); *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 19-20 n.17 (1977)).

gated by the existing agreements to continue paying Social Security benefits to those (and only to those) employees. To the contrary, this Court has remarked in similar circumstances that "a revenue bond might be secured by the State's promise to continue operating the facility in question; yet such a promise surely would not likely be construed to bind the State never to close the facility for health or safety reasons." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 25 (1977).

If Congress has not surrendered its ability to modify the System itself (as distinct from individual Section 418 agreements), the artificiality of the district court's approach becomes clear. Congress could have ignored the outstanding agreements and simply enacted new legislation bringing into the Social Security System those state and local government employees who already are covered.[11] And if Congress retained the authority to take such action, it seems absurd to suggest that it surrendered the power to modify the existing Section 418 agreements to achieve

[11] Making continued participation in the System mandatory only for workers who already are covered plainly is rational. Expanding coverage to workers outside the system would mean displacing existing pension systems. H.R. Comm. Print 97-34, at 18. And the rights of employees currently making Social Security payments may have vested; permitting them to withdraw may entitle them to benefits even though they no longer would be paying a portion of their wages into the System. H.R. Rep. 98-25, *supra*, at 19. See generally *FHA* v. *Darlington, Inc.*, 358 U.S. 84, 91 (1958) (citation omitted) ("'[f]ederal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution'"); *Califano* v. *Webster*, 430 U.S. 313, 321 (1977); *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 6 (1970).

the same result. Indeed, the legislative history indicates that Congress believed that it was, effectively, acting to expand the Social Security System when it amended Section 418(g). It made no reference to the modification of contractual rights; instead, it declared flatly that it was "prohibit[ing] State and local governments from terminating Social Security] coverage for their employees." H.R. Rep. 98-25, *supra*, at 19; S. Rep. 98-23, *supra*, at 5. That Congress found it most efficacious to take this step by making existing agreements nonterminable, rather than by, in terms, making participation in the System mandatory, cannot have independent constitutional significance.

3. a. The district court did more than misread Section 418; even granting the court's assumption that Section 418 agreements are contracts of a conventional sort, it erred by disregarding this Court's decisions on the validity of laws that affect preexisting contractual obligations.[12] As the Court explained last Term, when a contract is impaired by federal legislation, "the judicial scrutiny [is] quite minimal" (*National Railroad Passenger Corp.*, slip op. 21): to make out a constitutional violation, the complaining party must demonstrate " 'that the legislature has acted in an arbitrary and irrational way.' "

[12] At the outset, it is far from clear that a "takings" analysis is appropriate in this case at all. The Constitution's guarantee of just compensation is " 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123 (1978) (citation omitted). Here, however, Congress has acted to ensure that the vast bulk of the workforce (and the Nation's employers) obtain the *same* benefits and are subjected to the *same* obligations.

Pension Benefit Guarantee Corp. v. *R.A. Gray & Co.*, No. 83-245 (June 18, 1984), slip op. 10 (quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)). See *National Railroad Passenger Corp.*, slip op. 21, 25; *Norman* v. *Baltimore & O.R.R.*, 294 U.S. 240, 307-308 (1935).[13]

The challenged legislation at issue here is unquestionably rational: it helped secure the solvency of the Social Security System, while both protecting the interests of state and local government employees and preserving public confidence in the System as a whole. As Congress explained, the "voluntary coverage provision can be seen as an anomaly in the context of a basically mandatory system." H.R. Rep. 98-25, *supra*, at 19. And many employees covered by Section 418 agreements—in particular, those whose coverage had not vested at the time of termination, who change jobs frequently, or who have low incomes—faced the prospect of significant injury when their employers "file[d] for withdrawal in sig-

[13] In *National Railroad Passenger Corp.*, the Court reserved the question whether "an allegation of a governmental breach of its own contract warrants application of a more rigorous standard." Slip op. 20. However the Court answers this question in other contexts, a more rigorous test plainly would be inappropriate in this case. The Court occasionally has suggested that the government should be held to a higher standard to maintain the credit of public debtors (see *Perry* v. *United States*, 294 U.S. 330, 346-347 (1935); *Lynch* v. *United States*, 292 U.S. 571, 580 (1934)) or when the government's actions are simple attempts to reduce its financial obligations. See *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 25 n.23, 26 & n.25 (1977). See generally *National Railroad Passenger Corp.*, slip op. 20 n.24; *Lynch*, 292 U.S. at 580. Here, in contrast, the government is not attempting to terminate its obligations; to the contrary, it is attempting to *include* a large portion of the workforce in the national insurance system.

nificant numbers * * * for reasons that appear to have more to do with reducing operating costs than providing basic, adequate protection for all employees." *Ibid.* See H.R. Comm. Print 97-34, at 12-13, 15, 16. Conversely, Congress found considerable resentment on the part of covered employees towards that group of state and local government workers who had been in the System long enough to remain eligible for full benefits even after they were withdrawn by their employers. H.R. Rep. 98-25, *supra*, at 19. In these circumstances, the legislative action was, as the Court has remarked in the Contracts Clause context, plainly "appropriate to the public purpose justifying its adoption." *United States Trust Co.*, 431 U.S. at 22.

b. This conclusion is enough to establish that the 1983 modification of Section 418(g) does not implicate the Fifth Amendment. It should be added, however, that the district court also disregarded a second distinct strand of "takings" law that establishes the constitutionality of the challenged legislation.

As this Court repeatedly has noted, "government regulation—by definition—involves the adjustment of rights for the public good." *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979). Thus, at least "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66. See *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124, 130, 136-138 (1978).[14]

[14] While contract rights are a form of property that may be taken for a public purpose (see, *e.g.*, *United States Trust Co.*, 431 U.S. at 19) the Court generally has inquired only into the rationality of federal legislation impairing the value of contracts (see pages 16-17, *supra*), instead of applying the somewhat more elaborate test spelled out in *Allard* and *Penn Central*. It apparently has done so both to forestall the danger that parties will attempt to "remove their transactions from the reach of dominant constitutional power by making contracts about them" (*Norman*, 294 U.S. at 307-308 (1935)), and because legislation affecting more tangible property interests is more likely to "interfere[] with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124.

Here, state employers retain the principal benefit that led them to enter into Section 418 agreements—participation in the Social Security System. Nothing in the 1983 amendment changed the nature of the ongoing relationship between employers and the federal government. And while termination no longer is possible, it is far from clear that the ability to withdraw from the System was, at any point, a significant part of the attraction of the Section 418 program. To the contrary, the termination provision "receive[d] little attention in the legislative histories of [Social Security Act] amendments since 1939, presumably because it was assumed that once covered, few groups would seek to terminate coverage." H.R. Comm. Print 97-34, at 3. Indeed, in the program's first 13 years only four local government entities, representing a total of 48 employees, withdrew from the System (*id.* at 26); only one state (Alaska) ever has withdrawn its own employees from the System (see *id.* at 1); and the states have made no attempt to withdraw the vast bulk of covered local government employees. In these circumstances, it is difficult to see how the amendment to Section 418(g) violated "the dictates of "'justice and fairness."'" *Allard*, 444 U.S. at 65 (citations omitted).

CONCLUSION

Probable jurisdiction should be noted.
Respectfully submitted.

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SEPTEMBER 1985

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. Civil S-83-406 LKK

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL., PLAINTIFFS

v.

MARGARET HECKLER, Secretary, Department of Health and Human Services, ET AL., DEFENDANTS

No. Civil S-83-776 LKK

STATE OF CALIFORNIA, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Filed May 29, 1985]

ORDER

The above-captioned cases are currently before the court on cross motions for summary judgment, preliminary injunction, and dismissal. The motions are disposed of in this Memorandum and Order.

SYNOPSIS

For several years, many political subdivisions of the State of California ("the public agencies") have voluntarily participated in the Old Age, Survivors, and Disability Insurance Benefits program of the federal Social Security Act. The federal and state statutes governing the public agencies' participation permitted them to withdraw from the program so long as they satisfied certain termination requirements. On April 20, 1983, the Congress amended that portion of the federal statute which permitted the public agencies to withdraw. The public agencies and the State then sued the United States and the administrators of the Social Security program, challenging the constitutionality of the amendment. They argued that the amendment constituted an illegal tax upon the State, and that various constitutional rights of the State, the public agencies and their employees were violated by passage of the 1983 amendment. Those challenges to the amendment are currently before the court.

Among the constitutional arguments proffered, the public agencies allege that the April, 1983 amendment effected a taking of their contract rights without just compensation. In resolving this issue, I am mindful of my duty to construe statutes as constitutional. I am also mindful of the fact that the statute I consider was enacted by Congress as part of a comprehensive package of legislation dealing with the intractable problem of ensuring the financial viability of one of the most important social programs adopted by the federal government. Nonetheless, and no matter with what circumspection a judge approaches the task, under our system it is "emphatically the province and duty of the judicial department to say what

the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

With all the deference to which an act of Congress is entitled, I nonetheless conclude in this opinion that, as against the United States, the public agencies were vested with the contractual right to withdraw from Title II, that this right constitutes "private property" within the meaning of the Just Compensation Clause of the Fifth Amendment, and that this property was taken from them by the United States without the "just compensation" mandated by that clause. I further determine, however, that to award just compensation in this case would frustrate the very purpose Congress had in passing the statute. Accordingly, I find that to comply with the provisions of the Constitution and to honor the evident intent of Congress I must declare the statute unconstitutional and of no effect to the degree that it prevents the State and its public agencies from withdrawing from the program.

Lest this Opinion be read too broadly, I briefly pause to clarify what this case is *not* about. This case does not involve mandatory participation in the Social Security system by the State of California or its public agencies. It may be assumed without deciding, that Congress could force the State and public agencies to provide Title II benefits to their employees, since the welfare of all United States citizens is of concern to the entire nation. *See Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985). It may be assumed (without deciding) that such an imposition might pass constitutional muster even though the Agreement permits the State to withdraw from the *contract*. In such a case, the State's *contractual* right to withdraw would appear

to be unaffected (thus a Just Compensation claim might be avoided), but the termination right would do the State no good since it would then be under a *statutory* obligation to participate in the Program. This is not, however, the situation presented here. In the case before this court, the Congress has specifically divested the State and its public agencies of their contractual right to terminate their participation in the Program; it has further instructed the Secretary to effectuate that divestment by directing her to refuse to accept any otherwise properly tendered notifications of withdrawal. It is to this statutory scheme that the lawsuits are tendered and it is only this question which is addressed.

I

FACTUAL BACKGROUND

Effective January 1, 1951, the State of California ("the State") and the United States executed an agreement ("the Agreement") pursuant to 42 U.S.C. § 418(a)(1) under which the Old Age, Survivors, and Disability Insurance Benefits program of the Social Security Act ("the Program" or "Title II") would be extended to public employees if and when the State and its eligible public agencies chose to include them. (*POSSE* Complaint Exhibit "A"; *CALIFORNIA* Complaint Exhibit "A"). As required by the federal statute in effect at the time the Agreement was executed, the Agreement permitted the State to withdraw any coverage group [1] of its public

[1] For purposes of this case, a "coverage group" is the eligible employees of the plaintiff public agencies. *See* 42 U.S.C. § 418(b)(5)(B) & (D).

employees upon two years' advance notice to the Secretary.

Pursuant to the statute, the Agreement required the State to make certain payments to the United States Treasury to finance its participation, and the participation of its public agencies. The Agreement provided that the State would pay into the United States Treasury, "amounts equivalent to the sum of the taxes which would be imposed under the Federal Insurance Contributions Act." (Agreement, *as amended* April 13, 1955, *CALIFORNIA* Complaint Exhibit "A").

In order to carry out its end of the bargain, the State enacted enabling legislation. *See* Cal. Gov't Code §§ 22000-22603 (West 1980 & Supp. 1985). Pursuant to the Agreement and that legislation, the State entered into individual agreements with those of its public agencies wishing to participate in the Program. The public agencies became enrolled in the program when the State and the United States modified the State/federal agreement to include them. *See* 42 U.S.C. § 418(c)(4). The public agencies were required by the state's enabling legislation to make certain "contributions" to the State as payment for their participation. *See* Cal. Gov't Code § 22551-53 (West 1980 & Supp. 1985). As permitted by that legislation, the public agencies could withdraw from coverage (and concomitant liability to the state), upon two years' advance notice to the State. *See* Cal. Gov't Code § 22310 (West Supp. 1985).

In sum, the United States agreed to enroll any public agency whose participation the State requested, so long as the State paid for the participation. In turn, the State agreed to enroll any public agency which requested it, so long as the public agency re-

imbursed the State for the costs of its participation. In an apparent attempt to avoid getting caught paying for public agencies which had already withdrawn from the Program, the State prohibited the public agencies from withdrawing except on the same terms and conditions (essentially) upon which the State itself could terminate their enrollment. Thus, in effect, the public agencies were permitted to withdraw only if the State could terminate their enrollment, thus ending the State's own liability for the public agencies' participation.

In April of 1983, Congress enacted section 103(a) and (b) of Public Law 98-21 (*see* 42 U.S.C.A. § 418(g) (West Supp. 1985)). This amendment deleted that part of the former statute which permitted the State to terminate the agreement, and to terminate coverage for any set of its public employees. The amendment provided that any state participating at the time of enactment could not withdraw under any circumstances. It also purported to invalidate any notices of withdrawal which had already been filed, but which had yet to go into effect.[2] The State had

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[2] The challenged enactment reads:

(a) Section 218(g) of the Social Security Act [42 U.S.C. § 418(g)] is amended to read as follows:

"Duration of Agreement

"(g) No agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after the date of the enactment of the Social Security Amendments of 1983.".

(b) The amendment made by subsection (a) shall apply to any agreement in effect under section 218 of the Social Security Act on the date of the enactment of this Act [the Social Security Amendments of 1983], without regard to whether a notice of termination is in effect on

already submitted notices of voluntary withdrawal from the Social Security system on behalf of several of its public agencies.

These two related suits were filed to challenge that part of the enactment which prohibited the State from exercising the "escape clause" of the contract and thereby withdrawing from Title II.

II. THE PARTIES

The plaintiffs in *P.O.S.S.E. v. Secretary of H.H.S.* (Civ. S-83-406 LKK) ("POSSE") are several public agencies of the State of California, their employees and local taxpayers, and a group called Public Agencies Opposed to Social Security Entrapment ("POSSE"), who seek declaratory and injunctive relief against the defendant United States, the Secretary of Health and Human Services, and others.

For purposes of these cases, a "public agency" is "any city, county, city and county, district, municipal or public corporation, or any instrumentality thereof." Cal. Gov't Code § 22009 (West Supp. 1985). The original public agency plaintiffs are three Special Districts organized under the laws of California. They are Yorba Linda Library District,[3] North Bakersfield Recreation and Park District,[4] and Delano

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such date, and to any agreement or modification thereof which may become effective under such section 218 after that date.

P.L. 98-21, section 103 (April 20, 1983), 97 Stat. 65, 71-72, *reprinted at* [1] U.S. Code Congr. & Admin. News (98th Congr., 1st Sess., 1983).

[3] Library Districts are public agencies organized under Cal. Educ. Code §§ 19400-19432 (West 1978 & Supp. 1985).

[4] Recreation and Park Districts are public agencies organized under Cal. Pub. Res. Code §§ 5780-5788.13 (West 1984 & Supp. 1985).

Mosquito Abatement District.[5] By order of November 17, 1983, the plaintiffs were granted leave to join additional plaintiffs. The plaintiffs joined were five general law cities,[6] one charter city,[7] and eleven additional Special Districts.[8]

The POSSE plaintiffs name as defendants, the United States and the Secretary and Undersecretary of the federal Department of Health and Human Services. The Secretary is the successor in interest to the original federal signator to the Agreement with the State, and the federal official responsible for implementing Title II. In addition, the plaintiffs name as "Real Parties in Interest," the State of California,

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[5] Mosquito Abatement Districts are public agencies organized under Cal. Health & Safety Code §§ 2200-2360 (West 1979 & Supp. 1985).

[6] A "general law" city is a city "organized under the general law" of the State, and a public agency. Cal. Gov't Code § 34102 (West 1968). The general law cites added were Alturas, Arcata, Lincoln, San Clemente, and San Anselmo.

[7] A "charter" city is a city "organized under a charter." Cal. Gov't Code § 34101 (West 1968). The charter city added was Redondo Beach.

[8] The Special Districts added were: Aromas Tri-County Fire Protection District (*see* Cal. Health & Safety Code §§ 13801-999 (West 1984 & Supp. 1985)); Bear Mountain Recreation and Park District; Big Bear Municipal Water District (*see* Cal. Water Code §§ 71000-3001 (West 1966 & Supp. 1985)); Humboldt Community Services District (*see* Cal. Gov't Code §§ 61000-802 (West 1983 & Supp. 1985)); Marin Municipal Water District; Paradise Irrigation District (*see* Cal. Water Code §§ 20500-9978 (West 1984 & Supp. 1985)); Paradise Recreation and Park District; Pico Water District (*see* Cal. Water Code §§ 34000-8501 (West 1984 & Supp. 1985)); Placential Library District; Ranco Simi Recreation and Park District, and Sispuedes Fire Protection District.

its Governor, the Board and its members, and the State's Director of Finance, all in their official capacities as the entities and officials charged by state law with administering the State's participation in the Title II program. At oral argument, plaintiff explained that the "Real Parties in Interest" were named as defendants.

The sole plaintiff in *California v. United States* is the State of California. It names as defendants, the United States, and the Secretary and Undersecretary of the federal Department of Health and Human Services. All defendants in both actions are referred to, collectively, as "the Secretary."

III. THE CLAIMS & RELIEF SOUGHT

A. *P.O.S.S.E.*

According to the POSSE plaintiffs, the enactment of P.L. 98-21 prevents them from terminating their formerly voluntary participation in the Social Security program. They seek both an injunction to enjoin the Secretary from enforcing the law on the grounds that it is unconstitutional, and a declaratory judgment to that effect. They also seek "specific performance" of the government's contractual obligations.

The public agency POSSE plaintiffs (hereinafter collectively referred to as "the public agencies") predicate their claims upon four constitutional grounds, and what appears to be a suit for breach of contract. The public agencies assert first, that the defendants have deprived them of their "contract rights" without the just compensation required by the Just Compensation Clause of the Fifth Amendment.[9]

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[9] "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. 5.

Second, they assert that the enactment deprives them of their contract rights without the due process of law guaranteed by the Due Process Clause of the Fifth Amendment.[10] They assert as a third ground, that through the challenged enactment, the defendants have attempted to regulate "essential state and local government functions," in violation of the Tenth Amendment.[11] Finally, the public agencies appear to assert that the government has committed a breach of contract for which they seek a remedy in specific performance.

The individual POSSE plaintiffs assert that the defendants have denied them the equal protection of the laws guaranteed by the Due Process Clause of the Fifth Amendment.[12]

B. *The State*

The State seeks to enjoin enforcement of the statute on the grounds that it is unconstitutional, as well as a declaratory judgment of the statute's unconstitutionality. It also seeks relief in the form of mandamus. The State predicates its claims for relief upon

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[10] "No person shall be . . . deprived of life, liberty or property, without due process of law." U.S. CONST. amend. 5.

[11] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. 10.

[12] The Due Process Clause of the Fifth Amendment contains an equal protection component which protects individuals from governmental discrimination so arbitrary that it violates substantive due process. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *United States v. Yazzie*, 693 F.2d 102, 103 n.2 (9th Cir. 1982), *cert. denied*, 459 U.S. 1222 (1983).

two constitutional grounds. It alleges first, that the defendants acted in excess of any powers granted them by the Constitution by (1) breaching their contractual obligations to the State, and (2) impairing the State's ability to structure its relationships with its own public employees. Second, the State alleges that the defendants violated its sovereign rights under the Tenth Amendment by reason of the two acts just enumerated.

IV. SUBJECT MATTER JURISDICTION

The federal defendants move to dismiss this case pursuant to Fed. R. Civ. P. 12(b)(1), asserting a lack of subject matter jurisdiction in this court pursuant to the Anti Injunction and Declaratory Judgment Acts. The defendants argue that this suit seeks to enjoin the collection of federal taxes, and that such actions may not be brought in federal court. *See* I.R.C. § 7421(a); 28 U.S.C. § 2201. The defendants suggest in their papers that some of the plaintiffs lack constitutional standing to assert these claims. *See* Fed. R. Civ. P. 12(h)(3). I turn to the standing issue first.

A. CONSTITUTIONAL STANDING

At the outset, the court is confronted with a problem of the plaintiffs' constitutional standing to challenge the validity of the statute. As noted, the POSSE plaintiffs are public agencies, and their employees and residents within their respective jurisdiction. Yet, by its terms, the statute they challenge appears to abrogate only an agreement between the State and the federal government (assuming *arguendo* that it abrogates any agreement at all). Since the contract alleged to have been breached by the

defendants is a contract with a party other than any of these plaintiffs, the question arises whether the POSSE plaintiffs have a sufficient interest in the Agreement so as to confer upon them "standing" in the constitutional sense, to challenge a federal statute which allegedly abrogates it. Moreover, the "contract rights" allegedly taken by the defendants facially appear to be property only of the State, if indeed they are property at all.[13]

1. *Standards*

a. *Procedural Standards*

Standing is an issue addressed to the allegations of the complaint. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Plainly, the court may not decide the merits of the case in order to decide whether or not it may reach the merits. Therefore, "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Id.* at 501 (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969)); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979) (quoting *Warth v. Seldin*, 422 U.S. at 501).

b. *Substantive Standards*

This court has had occasion recently to explore at great length the question of standing. *See Sierra*

[13] The defendants do not challenge the State's standing, but the State has not made a Just Compensation claim.

Club v. Watt, —— F. Supp. —— (E.D. Cal. April 18, 1985). The court will not again set out at length its understanding of the law, but will merely summarize it as relevant to the instant case. As noted in *Sierra Club*, standing is composed of two components; one constitutional in dimension, the other prudential.[14] *Warth v. Seldin*, 422 U.S. at 498. The question of constitutional standing is one of "justiciability." *Id.* As such, it goes to the court's Article III power to adjudicate the claims asserted.[15] *Id.*; *Preston v. Heckler*, 734 F.2d 1359, 1363-64 (9th Cir. 1984). The Supreme Court has articulated the relevant inquiry as follows:

> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has

[14] The defendant's attack appears to be restricted to the constitutional component.

[15] Article III standing refers to the constitutional limitations imposed upon the federal court's exercise of subject matter jurisdiction. *See Fors v. Lehman*, 741 F.2d 1130, 1132 (9th Cir. 1984) (citing *Allen v. Wright*, 104 S. Ct. 3315 (1984)). The relevant part of Article III reads: "The judicial Power shall extend to all Cases . . . arising under [the] Constitution [and] Laws of the United States; [and] to Controversies to which the United States shall be a Party." U.S. CONST., art. III, § 2. As a result of this constitutional provision, this court does not have jurisdiction over this claim in the absence of a case or controversy; the standing doctrine is one component of their requirement. *Preston v. Heckler*, 734 F.2d 1359, 1363 (9th Cir. 1984).

> "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.

Warth v. Seldin, 422 U.S. at 498-99 (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *EMI, Ltd. v. Bennett*, 738 F.2d 994, 996 (9th Cir.) (quoting *Joyner v. Mofford*, 706 F.2d 1523, 1526 (9th Cir. 1983)), *cert. denied*, 105 S. Ct. 567 (1984).

In short, "[t]o comply with Article III, the plaintiff must show: (1) a distinct and palpable injury, (2) a causal connection between the injury and the defendant's conduct, and (3) a substantial likelihood that the relief requested will redress the injury." *NAACP, Western Region v. City of Richmond*, 743 F.2d 1346, 1350 (9th Cir. 1984) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982)).

2. *Resolution of the Standing Issue*

a. *The State*

The State meets the requirements for standing as to both of its claims. Its complaint alleges that the defendants' actions have caused them a "distinct and palpable" injury, to wit, a deprivation of its ability to structure its employment relationships with its public employees which it claims is an infringement on its sovereignty as a state, and a breach of the contract.

Whether the injury to its employment relations is in fact sufficient to permit the State ultimately to prevail is a question which goes to the merits. For standing purposes, it is sufficient that the State alleges a judicially cognizable interest in the preservation of its own sovereignty, and a diminishment of that sovereignty by the alleged interference in its employment relations with its public employees. *But see Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985), *overruling National League of Cities v. Usery*, 426 U.S. 833 (1976).

For standing purposes, whether or not the State's own sovereignty is actually infringed by the inability of its public agencies to withdraw from the social security program is not to be challenged in the context of this motion. Rather, this is a question going to the relationships between the state and its public agencies, and thus a question to await a determination on the merits. In California, this turns out to be a difficult inquiry most inappropriate for resolution at this threshold stage. *Cf. Moor v. County of Alameda*, 411 U.S. 693, 717-22 (1973).

The remaining aspects of the State's standing are not challenged, and the court finds that they are not subject to serious attack.

b. *The Public Agencies*

While the public agencies' constitutional standing is more problematic, the court is satisfied that they have standing to assert the Just Compensation claim pressed in their complaint. The only serious challenge to the public agencies' standing arises because it appears that they were not contracting parties to the allegedly breached contract upon which they predicate their Just Compensation claims. Normally, the court would simply assume the allegations of the complaint to be true. *See* § IV(A)(1)(a), *supra*. In these cases, however, the plaintiffs have attached copies of the Agreement to the complaints as Exhibits. Therefore, in resolving the standing issue on

the allegations of the complaint, I may also examine the Agreement itself. *See* Fed. R. Civ. P. 10(c).[16]

i. *Distinct and Palpable Injury*

The public agencies allege that their property is protected by the Just Compensation Clause and was taken by the Secretary without just compensation. If the plaintiffs can prove this, of course, they will have made out a constitutional violation, and thus a "distinct and palpable injury." *See Secretary of State v. Joseph H. Munson Co.*, 104 S. Ct. 2839 (1984). There are three hurdles the plaintiffs must overcome before they can prove this assertion, however. First, can the public agencies possess "private" property for purposes of the Just Compensation Clause?[17] Second, assuming that private property was taken, do the allegations establish that it was property of the public agencies? Finally, have the public agencies properly alleged a "taking" of the property within the meaning of the Just Compensation Clause?

(a) *"Private Property"*

The Just Compensation Clause provides that "private property" may not be taken for a public purpose without just compensation. U. S. Const. amend. 5. May a California *public* agency (a political subdivi-

[16] Exhibits attached to the complaint are parts of the complaint "for all purposes." Fed. R. Civ. P. 10(c). The Agreement is therefore before me for purposes of the standing issue, and the motion to dismiss. *Beneficial Life Insurance Co. v. Knobelauch*, 653 F.2d 393, 395 (9th Cir. 1981) (citing *Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426, 429-30 (9th Cir. 1978)).

[17] This is a question of law; its resolution is not dependent upon the allegations of the complaint.

sion of the State) possess "private property" within the meaning of the Just Compensation Clause?[18] Controlling authority establishes that it may. The Clause's reference to "private property" includes the property of local governments. *United States v. 50 Acres*, 105 S. Ct. 451, 456 (1984). *Cf., Standard Oil Co. v. Arizona*, 738 F.2d 1021, 1028-29 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 815 (1985).

Moreover, a taking of that property without just compensation is a "distinct and palpable" constitutional injury to the local government redressable in an action under the Just Compensation Clause; a local government or political subdivision is entitled to just compensation when the United States takes its property. *See 50 Acres*, 105 S. Ct. at 456 & n.15 (quoting *United States v. Carmack*, 329 U.S. 230, 242 (1946)); *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 101 (1893). *Accord, California v. United States*, 395 F.2d 261, 263-64 (9th Cir. 1968); *Washington v. United States*, 214 F.2d 33, 39 (9th Cir.), *cert. denied*, 348 U.S. 862 (1954).

(b) *Property of the Public Agencies*

Separate and apart from the question of whether the public agencies could, as a matter of law, possess private property within the meaning of the Just Com-

[18] The State has expressly disclaimed any reliance upon the Just Compensation Clause of the Fifth Amendment. Moreover, the public agencies have not argued that the taking of the State's property has injured them in any way; they argue only that the taking was of their own property. Therefore, I do not consider the possibility that the statutory amendment took any property of the State without just compensation.

pensation Clause, the complaint must sufficiently allege that the property taken was the public agencies' property, rather than someone else's. *See United States v. City of Pittsburg*, 661 F.2d 783, 786-87 (9th Cir. 1981) (quoting *Warth v. Seldin*, 422 U.S. at 501).[19]

Here, the public agencies allege that a "contract right" of theirs—to terminate participation in Title II—was taken. The problem, as pointed out by the Secretary, is that the contractual right of termination appears to run in favor of the State, not the public agencies. The public agencies counter with the argument that they are third-party beneficiaries of the contract (as demonstrated by the Agreement itself), and thus possess the same contractual rights as the State. Thus, they argue, *they* possess the contractual right which was allegedly taken without just compensation, and therefore, they have standing to assert the claim. Resolution of this question requires an examination of the Agreement and the applicable law of third-party beneficiaries.

Since this case involves a contract between the State and the United States, the first question to be resolved is: what law applies?[20] The general rule is that contracts entered into by the United States pur-

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[19] In *United States v. City of Pittsburg*, 661 F.2d 783 (9th Cir. 1981), the Ninth Circuit held that the City did not have standing to sue for just compensation when the only property allegedly taken belonged to the residents of the City, not the City itself. *Id.* at 786-87.

[20] The question is whether the Agreement executed between the State and the United States creates a contractual property right of termination in the public agencies. I must determine the answer to this question because it is this asserted property right which was allegedly taken by the United States.

suant to authority conferred by federal statute, are governed by federal law.[21] *United States v. Seckinger*, 397 U.S. 203, 209-10 (1970); *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir.), *cert. denied*, 104 S. Ct. 236 (1983). It is not seriously disputed that the Agreement was entered into pursuant to the authority granted by 42 U.S.C. § 418, and thus the Agreement is governed by federal law. The applicable law is derived from the controlling federal statutes, and, where they are silent, from the "principles of general contract law." *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947); *Seckinger*, 397 U.S. at 210 (citing *United States v. Standard Rice Co.*, 323 U.S. 106, 111 (1944)). Since, in this case, the governing federal statute (the Social Security Act) appears to be silent on the questions posed herein, I shall rely exclusively on what are, as best I can tell, the "principles of general contract law."[22]

As a general rule, rights which arise out of contracts with the United States are "property" within the meaning of the Fifth Amendment:

> The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.

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[21] The "federal law" referred to is often called "federal common law." *See North Side Lumber Co. v. Block*, 753 F.2d 1482, 14— (9th Cir. 1985).

[22] I note that my *primary* inquiry at this point is not whether the United States committed a breach of contract, but only whether this case involves a contractual property right belonging to the public agencies.

Lynch v. United States, 292 U.S. 571, 579 (1934); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977). The plaintiffs assert that they have rights "arising out of the contract" with the United States because they are either contracting parties, or at least third-party beneficiaries of the Agreement.

It appears to be a general principle of contract law that third-party beneficiaries are possessed of rights arising out of that contract. In particular, they have the contractual right to enforce the contract. *See Williams v. Fenix & Scisson, Inc.*, 608 F.2d 1205, 1208 (9th Cir. 1979). *See generally*, Restatement (Second) of Contracts §§ 304, 307 (1981); 4 Corbin, *Contracts* § 779J (1951). This right, arising from the contract, is "property" within the meaning of the Just Compensation Clause of the Fifth Amendment. To get down to basics, "property" is that group of rights which inhere in a person's relation to a physical or intangible thing. *See Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2873-74 (1984) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945)). It follows, therefore, that the rights arising out of a contract are "property" protected by the Fifth Amendment. The Supreme Court has so held. *See Lynch v. United States*, 292 U.S. at 579.

The final question at this stage of the standing inquiry, then, is whether the public agencies are third-party beneficiaries of the Agreement, and in particular, whether they are beneficiaries of the "escape clause." I conclude that they are. Under the general principles of contract law, a person is a third-party beneficiary if he can show that the contract was made for his direct benefit. *Williams*, 608 F.2d at 1208 (citing *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912)).

In this case, the Agreement (as required by statute) specifically provides that upon the request of the State, the Title II benefits are extended by the Secretary to the public agencies. The State agrees to pay the United States for the public agencies' participation.[23]

The specific arrangement in this case provided that the public agencies wishing to become participants in Title II were added to an appendix which was made a part of the Agreement. It thus appears that the public agencies became at least third-party beneficiaries[24] of the contract, if not actual contracting parties.

In particular, the public agencies were invested with the contractual right to terminate their participation in Title II when the State gave the Secretary two years advance termination notice.[25] I conclude that the "escape clause" is a contractual right running in favor of the public agencies, because the United States was on notice, both from the Agree-

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[23] Not surprisingly, however, the State recoups its costs by collecting it from the public agencies, pursuant to the enabling legislation.

[24] They would be termed "donee" third party beneficiaries:

> A third party . . . has an enforceable right by reason of a contract made by two others . . . if the promised performance will be of pecuniary benefit to him and the contract is so expressed as to give the promisor reason to know that such benefit is contemplated by the promisee as one of the motivating causes of his making the contract.

Williams v. Fenix & Scisson, Inc., 608 F.2d 1205, 1208 (9th Cir. 1979) (quoting 4 Corbin, *Contracts* § 776 at 18, 19 (1951)).

[25] There are other requirements not at issue here.

ment itself, and the existence of the State's enabling statutes (which were in effect at the time the public agencies were enrolled in the Program) that the State contemplated that the escape clause would run in favor of the public agencies.

The connection between the escape clause and the public agencies in this case is expressly manifested in the enabling legislation. The State, through the legislation, promised the public agencies that it would exercise the escape clause so as to release them from further participation, at their request (and with the requisite notice, etc.). Each time a public agency was enrolled in the Program, therefore, the United States was put on notice that the State would exercise the escape clause on behalf of the public agencies at their request. Under the totality of the circumstances it appears reasonable to conclude that the Agreement "is so expressed as to give the promisor reason to know that such benefit is contemplated by the promisee as one of the motivating causes of his making the contract." *Williams*, 608 F.2d at 1208. For all of the above reasons, then, the court determines that the public agencies, as third party beneficiaries, have standing to allege a taking of their contract rights without Just Compensation.

ii. *Causal Connection*

In order to establish their standing to assert the Just Compensation claim, the public agencies' complaint must establish "a causal connection between the injury and the defendant's conduct." I conclude that the plaintiffs' complaint establishes such a connection.

According to the complaint, the Congress' enactment of P.L. 98-21 deprived the public agencies of

their right to withdraw from the Program without just compensation.[26] Subsequently, the Secretary refused to accept or honor validly tendered notifications of termination from the Program. This, I infer from the allegations, effectuated the Secretary's enforcement of the statutory enactment. In order to establish the causal connection, the plaintiffs' complaint must establish that the Congressional action (or the subsequent executive refusal to accept the notifications) actually effected a "taking" of the property by the United States.

The complaint alleges with sufficient specificity, that the contractual right to terminate participation in the program existed prior to the enactment of the statute, and it was taken by the statute. The existence of the right to terminate is plain from the face of the Agreement, which is attached as an exhibit to the public agencies' complaint. Moreover, it is plain from the language of the amending statute that the Congress withdrew the right to terminate (whoever actually possessed the right). The Secretary's substantive dispute with the existence of a "taking" is discussed in the motion for summary judgment.[27]

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[26] The precise description of the type of taking employed does not appear relevant to the present inquiry, but it appears that this would constitute a "legislative taking" of property without just compensation. *See Kirby Forest Industries v. United States*, 104 S. Ct. 2187, 2191 (1984).

[27] The Secretary argues that there was no contract from which rights could arise, and that any rights arising from the contract were not "absolute" rights protected by the Fifth Amendment.

iii. *Redress of the Injury*

Resolution of this action in the public agencies' favor will redress the injury of which they complain. If the right to terminate is returned to them, or if they are somehow justly compensated for its loss, they will no longer have an injury. I conclude that this aspect of the standing inquiry is met by the public agencies.

c. *The Individuals*

The individuals claim that the defendants have denied them the equal protection of the laws. Although it may appear that in fact it is the state law, not the federal action, that has created the unequal protection problem (at least as between California public employees), this is again a question going to the merits. For purposes of the standing inquiry, the court will accept the plaintiffs' allegations as true.

Put another way, these plaintiffs' allegations in the context of the statutory scheme at least arguably tender the question of whether it is federal or state law which has caused the injury of which they complain. Having sustained a purported injury, they have standing to test whether it is the federal statute which is the cause of that injury.

B. RULE 12(B)(1) MOTION TO DISMISS

The defendants move to dismiss this claim on the grounds that pursuant to the Anti Injunction and Declaratory Judgment Acts, this court lacks jurisdiction over the subject matter. According to their argument, the plaintiffs seek an injunction and declaratory judgment against the collection of "taxes."

1. *Standards*

The standards applicable to a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction depend upon whether the motion is addressed to the allegations of the complaint, or to the existence of subject matter jurisdiction in fact. *See Thornhill Publishing Co. v. General Telephone & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (citing *Land v. Dollar*, 330 U.S. 731, 735 & n.4 (1947)). In this case, the defendants assert that the allegations of the complaint establish the court's lack of jurisdiction. In such a case, this court accords the plaintiffs the same procedural safeguards to which they would be entitled on a Rule 12(b)(6) motion to dismiss for failure to state a claim. *See Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981). The standards for dismissal under Rule 12(b)(6) are well known.

On a Rule 12(b)(6) motion to dismiss for failure to state a claim, the factual allegations of the complaint are accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam). So construed, the court may dismiss the complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hishon v. King & Spaulding*, 104 S. Ct. 2229, 2233 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

In spite of the deference the court is bound to give to the plaintiffs' allegations, however, it is not proper for the court to assume that "the [pleader] can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated General Contractors of*

California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983).

2. *Anti Injunction and Declaratory Judgment Acts*

The relevant portion of the Anti Injunction Act prohibits federal or state suits for the purpose of restraining the assessment or collection of any taxes. I.R.C. § 7421(a) [West Supp. 1985].[28] The relevant portion of the Declaratory Judgment Act excludes suits "with respect to Federal taxes" from the class of suits which may be brought under its provisions. 28 U.S.C. § 2201.[29] Thus the threshold question in any determination of the applicability of these statutes is whether they involve a "federal tax" within the intendment of either Act.

According to the defendants, the Declaratory Judgment Act's prohibition " 'indisputably' " applies to the collection of social security taxes, citing *Bob*

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[28] The relevant part of the Anti Injunction Act states:

> Except as provided [elsewhere], no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such a person is the person against whom such tax was assessed.

I.R.C. § 7421(a) [West Supp. 1985]. It is established that the Anti Injunction Act deprives the district court of subject matter jurisdiction of any cases within its description. "The object of § 7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collections of federal taxes." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962) ("Williams Packing"); *Stonecipher v. Bray*, 653 F.2d 398, 401 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982).

[29] *See Williams Packing, supra*, n.2831 [*sic*] (holding § 7421(a) applicable to suit to enjoin collection of social security and unemployment compensation taxes).

Jones University v. Simon, 416 U.S. 725, 741 (1974). The defendants may well be correct,[30] but their assertion assumes the answer to the question. The issue is whether the payments by the State are in fact "federal taxes" (Social Security taxes or otherwise) within the meaning of the Anti Injunction or Declaratory Judgment Acts, not whether such taxes may be the subject of federal lawsuits.

It appears relatively clear that the exaction of money from the State in this case, both prior to and subsequent to the enactment of P.L. 98-21, is not a "tax" within the meaning of the Anti Injunction or Declaratory Judgment Acts. In *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), several states, and others, challenged "a system of monetary exactions in the form of license fees" imposed by the President of the United States pursuant to the purported statutory authority of section 232(b) of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862(b). 426 U.S. at 550-52. The Court squarely held the suits were not barred by the Anti-Injunction Act because the "monetary exactions" were not assessable under the Internal Revenue Codes:

> The Anti-Injunction Act applies to suits brought to restrain assessment of taxes assessable under the Internal Revenue Codes of 1954 and 1939.... The license fees in this case are assessed under neither Code but rather under the statutory authority conferred on the President by the Trade

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[30] My conclusion here would not necessarily affect my consideration of whether the State is paying a "tax" for constitutional purposes.

> Expansion Act of 1962, as amended by the Trade Act of 1974. The fees are therefore not "taxes" within the scope of the Anti-Injunction Act.

426 U.S. at 558 n.9.

In this case, although the "monetary exactions" paid by the State into the United States Treasury are reckoned by reference to provisions of the Internal Revenue Code, they are not assessed pursuant to the Code. Rather, they are assessed pursuant to the Agreement voluntarily entered into between the State and the federal government. Even after the exactions ceased to be voluntary, they are still assessed pursuant either to the now mandatory Agreement, or pursuant to the 1983 Amendment to Title II, 42 U.S.C. § 418(g). In no event are these exactions assessed pursuant to any provision of the Internal Revenue Code. This action therefore is not barred by the Anti Injunction or Declaratory Judgments Acts.[31]

I thus conclude that the actions are not barred by the Anti Injunction or Declaratory Judgment Acts. The court finds that subject matter jurisdiction over these actions is proper pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction).

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[31] In any event, if there is no other means for the plaintiffs to challenge the validity (as opposed to the amount) of their payments to the Treasury, the lawsuit may not be subject to the restriction imposed by the Anti Injunction Act. *South Carolina v. Regan*, 104 S. Ct. 1107 (1984). In the absence of briefing on this issue, the court will not rely upon that proposition. Nevertheless, the court appreciates the highly professional behavior of the United States Attorney in bringing *South Carolina v. Regan* to its attention.

V. THE MOTIONS FOR SUMMARY JUDGMENT

A. *Standards*

The parties have filed cross motions for summary judgment asserting that there are no facts in dispute. Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Poller v. C.B.S.*, 368 U.S. 464, 467 (1962); *Retail Clerks Union Local 648 v. Hub Pharmacy, Inc.*, 707 F.2d 1030, 1033 (9th Cir. 1983). The moving party bears the burden of proof on these issues. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 901 (9th Cir. 1983). In this case, the material facts are undisputed, and only the legal interpretation of those facts is in dispute. The cross motions therefore turn on the applicable law.

B. *Was There a "Taking"*

Because the court resolved in the standing context that the public agencies had a property right in the escape clause, I turn to the next requirement of a Just Compensation Claim; namely, was there a taking? Under the Agreement the public agencies had a right to withdraw; under the amended statute they do not. Nonetheless, defendants argue there was no taking. According to the defendants, 42 U.S.C. § 1304 gives the Secretary the right to alter or amend the Social Security Act no matter what effect any such alterations or amendments might have on the Agreement. That section provides: "The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress." 42 U.S.C. § 1304.

From this language, the defendants appear to argue that there was no contract for them to breach: "Congress obviously did not intend to authorize the Administrator to enter into 'contracts' which would forever preclude Congress from amending Section 218 without the agreement of every state in the nation." (United States' Motion for Summary Judgment at 19).

To the degree that defendant's argument is predicated on the absence of a contract, it simply will not lie. Both sets of plaintiffs have attached to their complaints a writing which purports to be a contract between the State and the federal government. That document evidences an agreement between the parties signatory thereto, that each promises to do certain things and to assume certain obligations. Under any definition of contract, this is a contract. *See, e.g., Woods v. United States*, 724 F.2d 1444, 1449 (9th Cir. 1984) (citing *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981)).[32]

Basing their arguments upon 42 U.S.C. § 1304, the defendants argue that the Congress may amend Title II notwithstanding whatever effect it may have upon the Agreement, because the Agreement implicitly incorporates every law existing at the time and place of execution of the contract, including 42 U.S.C. § 1304, citing *United States Trust Co. v. New*

[32] To the degree that the United States is making an argument that the contract is illusory because, by virtue of section 1304 it is not bound, the argument is just another way of expressing the notion that, section 1304 provides Congress with the power to amend both the law and the contract. Because I dispose of that argument in the text above, I do not consider it separately in the context of the sufficiency of the contract.

Jersey, 431 U.S. 1, 19 n.17 (1977) and *Home Building Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429-30 (1934). As a result, according to the defendants, the Agreement itself contemplates that its terms may unilaterally be changed whenever the Congress chooses to do so. Under this analysis, the defendants conclude that the enactment of P.L. 98-21 was not a repudiation of the contract, but a mere exercise of Congress' right, inherent in the contract itself, to "change" the terms of the Agreement pursuant to § 1304.[33]

Defendants may well be correct that the Congress has the right to amend Title II whenever and however it chooses. *See* 42 U.S.C. § 1304. Nonetheless, the assertion is beside the point. Section 1304 does not authorize Congress to alter or amend the *contract*; it only authorizes the Congress to alter or amend the statute. 42 U.S.C. § 1304. Defendants' argument is predicated upon a failure to separate the terms of the Agreement from the terms of Title II prior to the challenged amendment.

Both the Agreement and the statute provided that the State could withdraw after the giving of two years' advance notice. I assume *arguendo* that Congress would have had the power under § 1304 (or otherwise) to divest the State of its right to withdraw if the right existed solely by virtue of the statute.[34]

[33] Although this argument is raised in another context, if it is correct it may lead to the conclusion that no "taking" occurred.

[34] In *Flemming v. Nestor*, 363 U.S. 603 (1960), for example (cited by the defendants) the Congress had amended Title II to exclude from benefits anyone deported because of membership in the Communist Party. *Id.* at 605. The statute was

In this case, however, the right to withdraw does not exist solely by virtue of the statute. The state's right to terminate draws its independent existence from the plain terms of the contract it executed with the United States. Even if Congress' power to amend the statute is incorporated into the contract, such incorporation does not address the question of whether, when Congress exercises that power, it may deprive the State of its existing contractual rights without compensation. By virtue of the Fifth Amendment, Congress is simply not free to deprive the State of its contractual right without just compensation.[35]

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challenged as unconstitutional. Among other arguments, the plaintiff argued that he had "an accrued property right" to the Social Security benefits, of which the statute unconstitutionally deprived him. Discussing § 1304, the Court held that the Congress had the authority to amend Title II even if it deprived a person of future benefits to which he would otherwise be entitled. *Id.* at 610-11. This was so because the Congress had only terminated a "noncontractual benefit" which existed solely by virtue of the statute. *Id.* at 611. Unlike the Congressional action in *Flemming*, the action complained of herein is the termination or abrogation of a contractual right. The *Flemming* Court expressly limited its holding by noting that the holding did not loose the Congress to "modify the statutory scheme free of all constitutional restraint." *Id.* at 611.

[35] Moreover, under the defendants' own version of the law, the assumption that Congress could freely revoke the right to withdraw so long as that right did not arise out of the contract, may be unjustified. In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the Court stated:

> The obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement. "This Court has said that 'the laws which subsist at the time and place of the making of a contract,

C. *Just Compensation*

Congress clearly and explicitly intended to deprive the plaintiffs of their right to withdraw from the contract. *See* P.L. 98-21 § 103(a) and (b), 97 Stat. 65, 71-72, *reprinted at* [1] U.S. Code Congr. & Admin. News (98th Congr. 1st Sess., 1983). Moreover, Congress provided no means of compensation for depriving plaintiffs of that right. Ordinarily, under such circumstances plaintiff's remedy is to seek "just compensation," in the Court of Claims rather than a declaration that the action of the Government must be set aside. *Ruckelshaus*, 104 S. Ct. at 2880-83. *Cf. Robinson v. Ariyoshi*, 753 F.2d 1468, 1474-75 (9th Cir. 1985). In this case I am not free simply to order "just compensation" to the plaintiffs, or to refer the case to the Court of Claims, thus possibly saving the statute from a declaration of unconstitutionality. The only rational compensation would be reimbursement by the United States to the State or public agencies, of the amount of money they currently pay to the United States for their participation in Title II, since that seems the only sensible measure of damages.

> and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.' ". . . This principle presumes that contracting parties adopt the terms of their bargain *in reliance on the law in effect at the time the agreement is reached.*

Id. at 19 n.17 (quoting *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429-30 (1934)) (emphasis added).

The law in effect at the time these parties entered into the Agreement stated that the State could withdraw from the program so long as it gave the defendants two years' advance notice. Therefore, even if the Agreement did not expressly incorporate this law, it was nonetheless implicitly incorporated.

As explicated in the Secretary's Motion for Summary Judgment, the legislative history clearly demonstrates that this statute was passed in order to solve the financial crisis found to exist relative to the social security system. (Federal Motion at 1-16).[36] Its purpose was to ensure an adequate financial basis for that system by requiring the states and their public agencies to contribute to the system. (*Id.*) It simply cannot be doubted that to construe the statute so as to require the United States to pay just compensation by making the contribution for the public agencies is simply and clearly contrary to the will of Congress. While I am under an obligation to construe statutes so as to avoid a finding of unconstitutionality, I may do so only when such a construction is consistent with the will of Congress. *See, e.g., Selective Service System v. Minnesota Public Interest Group*, 104 S. Ct. 3348, 3355 (1984) (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 571 (1973)). Here, the will of Congress cannot be given expression since to do so violates the Just Compensation provision of the Constitution. I must conclude that the Congress acted without constitutional authority when it took the plaintiffs' contractual property right to withdraw from the Agreement without just compensation and that no rational measure of damages may be awarded consistent with Congress' purpose in passing the statute. Congressional action taken without constitutional authority being void,

IT IS HEREBY DECLARED that the challenged Act of Congress, P.L. 98-21, Section 103(a) and (b),

[36] The primary source of legislative history cited by the United States is H.R. Rep. No. 98-25, 98th Cong., 1st Sess. 11 (1983), *reprinted at* 2 U.S. Code Congr. & Admin. News 219-404 (1983).

is void and of no effect as it purports to affect these plaintiffs; and the State of California and its political subdivisions have the lawful right to withdraw from Title II so long as they have met the requirements of the Agreement and the law.[37]

The Secretary of Health and Human Services is hereby ORDERED to accept the notifications of withdrawal properly tendered to her.

The remaining motions are now MOOT.

IT IS SO ORDERED.

DATED: May 24, 1985

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge
United States District Court

[37] This Opinion draws no conclusion as to the validity of the amendments as they affect anyone joining the Program subsequent to their enactment.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Civ S-83-776-LKK

PUBLIC AGENCIES

v.

SECRETARY OF HHS

[Filed May 31, 1985]

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment is entered pursuant to the order filed 5-29-85.

J.R. GRINDSTAFF
Clerk

/s/ S. Furstenau
(By) Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. Civil S-83-406-LKK

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL., PLAINTIFFS

v.

MARGARET HECKLER, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

No. Civil S-83-776 LKK

STATE OF CALIFORNIA, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Filed June 27, 1985]

NOTICE OF APPEAL

The defendants United States of America, et al., and Margaret Heckler, Secretary, Department of Health and Human Services, et al., hereby appeal from the final order in the above-captioned case, filed

on May 29, 1985 and entered on May 31, 1985. This appeal is taken to the Supreme Court of the United States pursuant to 28 U.S.C. 1252.

Respectfully submitted,

/s/ M. Susan Carlson
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No. 85-521

In The
Supreme Court of the United States
October Term, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Appellants,

v.

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.,
Appellees.

UNITED STATES OF AMERICA, ET AL.,
Appellants,

v.

STATE OF CALIFORNIA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

MOTION TO DISMISS OR AFFIRM

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Appellants,

v.

STATE OF CALIFORNIA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to rule 16 of the Rules of the Supreme Court of the United States, hereby moves this Court to dismiss this appeal or to affirm the decision of the United States District Court for the Eastern District of California for the following reason:

This case does not present a substantial federal question.

INTRODUCTORY STATEMENT

Appellants appeal the decision of the United States District Court for the Eastern District of California, which ruled that Act of Congress, Pub.L. 98-21, section 103(a) and (b) is void and the State of California and its political subdivisions have the lawful right to withdraw from the Old Age, Survivors and Disability Insurance Benefits program of the Social Security Act ("Program") as long as they have met the requirements of the agreement between the United States and the State of California and the law. It should also be noted that in its Statement of Parties To The Proceedings, appellants have set forth an incomplete list of the parties.

———o———

SUMMARY OF ARGUMENTS

We will demonstrate that there is no substance to the arguments raised by appellants in their Jurisdictional Statement ("J.S."). Those arguments are that agreements executed pursuant to 42 United States Code section 418 are not true contracts and, thus, are subject to congressional modifications at will; or, in the alternative, if they are true contracts, they are nevertheless subject to congressional modification for which courts can give only minimal scrutiny.

———o———

STATEMENT REGARDING THE FACTS

Although the Social Security Act (42 U.S.C., §§ 301 et seq.) exempted state and local governments from mandatory participation in the program, in 1950 the Act was amended to permit the states to enroll their employees and those of their political subdivisions in the program upon the execution of an agreement with the United States Secretary of Health and Human Services.

Effective January 1, 1951, the State of California ("State") and the United States executed an agreement ("Agreement") pursuant to 42 United States Code section 418(a) (1) under which the Old Age, Survivors and Disability Insurance Benefits program of the Social Security Act ("Program") would be extended to public employees if and when the State and its eligible public agencies chose to include them.

As originally enacted and in effect on January 1, 1951, the Agreement permitted the State to withdraw any coverage group, that is, eligible employees of the appellee public agencies, upon two years' advance notice to the Secretary. (42 U.S.C., § 418(g).)

To implement its Agreement, the State enacted enabling legislation (Gov. Code, §§ 22000-03) pursuant to which Agreement and legislation, the State entered into individual agreements with those public agencies wishing to participate in the Program. Then the public agencies became enrolled in the Program when the State and the United States modified the state/federal agreement to include them. (42 U.S.C., § 418(c)(4).) The public agencies were required by the State's enabling legislation to make certain "contributions" to the State as payment for their

participation. (Gov. Code, §§22551-53.) As permitted by that legislation, the public agencies could withdraw from coverage (and concomitant liability to the State), upon two years' advance notice to the State. (Gov. Code, § 22310.)

Then, in April 1983, Congress enacted Public Law No. 98-21, section 103(a) and (b), amending 42 United States Code section 418(g), to provide that "[n]o agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983." In other words, this amendment prevented any state from withdrawing coverage for any set of its employees, even if a termination notice had been filed and was pending at the time Public Law No. 98-21, section 103(a) and (b) was enacted.

The State, which had a section 418 Agreement with the Secretary since 1951, had filed termination notices through April 1983, on behalf of approximately 70 of its political subdivisions with approximately 34,000 employees. However, Public Law No. 98-21 prevented the termination from taking place in due course.

The appellees then filed these suits to challenge the amended section 418(g), which prohibited the State from withdrawing from the Program.

The district court decided that the Agreements were contracts and thus properly within the meaning of the Fifth Amendment's Takings Clause. The district court also found that the right to withdraw was a contractual right and went on to conclude, therefore, that Congress could not deprive the State of that right without just compensation. However, the district court said it could not

order "just compensation" in the usual sense because of the unique circumstances. Instead, the court declared that amended section 418(g) is void and that the State and its political subdivisions have the lawful right to withdraw from the Program.

———o———

ARGUMENT

I

INTRODUCTION

In its opinion, the district court held that apart from the statute, appellees have a contractual right to withdraw from the System. The court recognized that Congress may terminate the statutory right to withdraw but that it may not abrogate or repudiate the State's contractual rights.

Because this proposition is so clear, simple and undeniable, appellants have advanced an array of conclusions rather than legal authority to support their thesis that the Agreement is not a contract. (J.S. 10-16.) They also proffered additional conclusions that even if the Agreement is a contract, they are not bound by its terms because Congress amended section 418(g) for the public good. (J.S. 16-19.)

Moreover, because of their tenuous position, appellants have referred interchangeably to three different sets of relationships. Since each of these relationships has a different legal effect as demonstrated by the opinions of this Court, it is vital to recognize their discreteness and keep them in their proper context. These relationships are as follows:

1. Express contracts (agreements) to which the federal government is by the terms of the contract one of the parties to the contract. It is this type of relationship which is not only at issue in this case but also which this Court consistently has held binds the federal government. Accordingly, any decisions of this Court which do not deal with this type of relationship are simply inappropriate.

2. Legislative acts which may or may not confer contractual status upon parties depending upon the statutory language involved. The instant case is not such a case.

3. Contracts between a governmental entity other than the federal government and private parties, or strictly between private parties. Again, the instant case is not such a case.

Thus, the appellants' Jurisdictional Statement should be read with these distinctions clearly in focus.

II

THE DISTRICT COURT PROPERLY HELD THAT APPELLANTS HAVE A CONTRACTUAL RELATIONSHIP WITH APPELLEES.

As the district court noted, the Agreement executed between appellants and appellees evidences an agreement between the parties that each promises to do certain things and to assume certain obligations. "Under any definition of contract, this is a contract. See, *e.g., Woods v. United States*, 724 F.2d 1444, 1449 (9th Cir. 1984) (citing *Pennhurst State School & Hospital v. Holderman*, 451 U.S. 1, 17 (1981))." (*Pub. Agencies Opp. To Soc. Sec. Entrapment v. Heckler*, 613 F.Supp. 558, 573 (D.C. Cal. 1985).)

Because of the elementary nature of this legal concept, appellants have relied on their conclusionary statement that "Section 418 [agreements] thus constitutes a social welfare program essentially universal in its application, rather than 'a contractual arrangement.' *National Railroad Corp. v. Atchison, T. & S.F. Ry.* . . . . " (J.S. 10-11.) Appellants continue with further reliance upon *National Railroad* for other generalized conclusions. Unfortunately for appellants, however, this Court pointed out that there is a definite distinction between contracts to which the United States is and is not a party.

> "Because, as we have demonstrated, neither the Act nor the Basic Agreements created a contract between railroads and the United States, our focus shifts from a case in which we confront an alleged impairment, by the government, of its own contractual obligations, to one in which we face an alleged legislative impairment of a private contractual right. We therefore have no need to consider whether an allegation of a governmental breach of its own contract warrants application of the more rigorous standard of review that the railroads urge us to apply. Instead, we turn to consider whether the payment obligation in §405(f) of the Act unconstitutionally impairs the private contractual rights of the railroads." *Woods v. United States*, 724 F.2d 1444, 1454-1455 (9th Cir. 1984).)

Appellants then argue not only that pursuant to 42 United States Code section 1304, Congress has repealed the termination right but also that contractual arrangements remain subject to subsequent legislation. As far as the former is concerned, there is no doubt that Congress can repeal or modify the statute. But as the district court noted:

> "Even if Congress' power to amend the statute is incorporated into the contract, such incorporation does not address the question of whether, when Congress exercises that power, it may deprive the State of its existing contractual rights without compensation. By virtue of the Fifth Amendment, Congress is simply not free to deprive the State of its contractual right without just compensation." *(Pub. Agencies Opp. To Soc. Sec. Entrapment v. Heckler, supra,* 613 F.Supp. at 574.)

The decisions upon which appellants rely hardly support their second contention. Aside from *National Railroad Passenger Corp. v. Atchison T. & S.F. Ry.*, — U.S. — , 105 S.Ct. 1441 (1985), appellants refer to *Merrion v. Jicarillo Apache Tribe,* 455 U.S. 130 (1982), which is totally inapposite. In *Merrion,* this Court held that the failure to mention severance taxes in the oil leases on tribal lands did not prohibit the Indians from imposing the tax because the Indians always had the sovereign power to tax. But the fact that the sovereign retained the power to tax irrespective of the contract has no bearing upon the rights and obligations that are set forth in the instant parties' Agreement.

Appellants then seize upon a statement from *Flemming v. Nestor,* 363 U.S. 603 (1960) in support of their position without first pointing out the salient fact that in *Flemming* this Court was determining the rights of an ordinary non-governmental employee covered by the Social Security Act. Interestingly enough, the Court also said that Congress may not modify the statutory scheme of the program "free of all constitutional restraint." (*Id.,* at 611.)

Next, appellants rely on certain language from *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1976) to fortify their sovereign power contentions. But it does not assist them for this Court made clear that,

> " . . . a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly a State is not free to impose a drastic impairment when an ardent and more moderate course would serve its purposes equally well." *(Id.,* at 30-31.)

So this Court said in adopting a two-prong test of reasonable and necessary, that is, necessary to achieve the plan and reasonable in light of the circumstances. *(Id.,* at 29.) Here, appellants presented no evidence whatsoever before the district court to show whether or not they met the test set out in *United States Trust.*

Finally, appellants egregiously misparaphrase language from *National Railroad* with their statement that "when a contract is impaired by federal legislation, 'the judicial scrutiny [is] quite minimal.' *(National Railroad Passenger Corp.,* slip op. 21.)" (J.S. 16.) The truth of the matter, however, is that this Court said: "*When the contract is a private one, and when the impairing statute is a federal one,* this next inquiry is especially limited, and the judicial scrutiny quite minimal." *(Id.,* 105 S.Ct. at 1455.)

Appellants add further confusion with their statement "to make out a constitutional violation, the complaining party must demonstrate ' "that the legislature has acted in an arbitrary and irrational way." ' (Various citations.)" (J.S. 16-17.) Appellants omitted to state that this principle applies to situations or contracts solely involving private parties. For example, see *Pension Benefit*

Guaranty Corp. v. Gray & Co., — U.S. — , 81 L.Ed.2d 601, 610-611 (1984).

Most importantly, this Court has observed on previous occasions that "impairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties . . . ." (*Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, fn. 15 (1977).)

Thus, in analyzing the issue in this matter, we must be continually mindful of the fact that here we are dealing with a contractual agreement between the United States and the appellees, a circumstance which is governed by tests which are different from those discussed at length by appellants in their Jurisdictional Statement.

III

THE DISTRICT COURT PROPERLY FOUND THAT THE APPELLANTS ARE BOUND BY THEIR CONTRACTUAL OBLIGATIONS.

The principle is well established that the United States and its duly appointed agents are bound by their contractual obligations. Years ago in *Perry v. United States*, 294 U.S. 330, 350-351 (1935), this Court said:

> "On that reasoning, if the terms of the Government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to the amount to be paid may also be repudiated. The contention necessarily imports that the Congress can disregard the obligations of the Government at its discretion and that, when the Government borrows money, the credit of the United States is an illusory pledge.

> "We do not so read the Constitution. . . . To say that the Congress may withdraw or ignore that pledge, is to assume that the Constitution contemplates a vain promise, *a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government. . . .* " (Emphasis added.)

This Court in *Perry* further noted that in *Lynch v. United States*, 292 U.S. 571, 580 (1934), which centered around the severe economic conditions of the depression, this Court had earlier said:

> "No doubt there was in March, 1933, great need of economy . . . But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. *To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. . . .* " (Emphasis added.)

This principle was again recognized by this Court in *National Railroad Corp. v. Atchison, T. & S.F. Ry. Co., supra*, — U.S. — , 105 S.Ct. 1455, fn. 24:

> "There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements. . . . To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government. *Perry v. United States*, 294 U.S. 330, 350-351, 55 S.Ct. 432, 434-435, 79 L.Ed. 912 (1935)."

In spite of this long standing state of the law, appellants seek to circumvent their obstacle by claiming that 42 Uni-

ted States Code section 1304 gives Congress the right to change contracts as well as statutes. This Court described a similar contention as being absurd: "A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." *(Murray v. Charleston,* 96 U.S. 432, 445 (1877), cited with approval in *United States Trust Co. v. New Jersey, supra,* 431 U.S. at 25.)

Appellants' last defense is based on the "general welfare" or "for the good of the people" argument. This, too, is as untenable as their other contentions. As trying as the economic climate has been in recent years, it pales in comparison with the utter despair of the 1930's. Yet, this Court in *Perry v. United States, supra,* 294 U.S. 330, did not find those truly extreme economic conditions as justification for repudiating or even substantially altering the contractual obligations of the United States.

To argue, as do appellants, that the change of a key provision in a contract without which appellees would not have entered into the System's domain is not a repudiation is to argue that nothing in a contract really matters unless the United States so wants it. Of course, that is total nonsense. Where substantial prejudice occurs, as it does here with the elimination of the withdrawal provision, the unilateral change sought by the System obviously results in a repudiation of the contract. Nothing could be clearer in this regard than this Court's statement that, "To abrogate contracts, in the attempt to lessen government expenditures, would be not the practice of economy, but an act of *repudiation.*" *(Perry v. United States, supra,* 294 U.S. at 352-353; emphasis added.)

IV

THE DISTRICT COURT PROPERLY FOUND THAT CONTRACTS WITH THE UNITED STATES ARE VESTED PROPERTY RIGHTS AND THEIR TAKING WITHOUT DUE PROCESS OF LAW AND/OR JUST COMPENSATION VIOLATES THE FIFTH AMENDMENT.

The district court correctly found that there was a "taking" without just compensation in this case. As this Court said in *Lynch v. United States, supra,* 292 U.S. at 579.

> "The Fifth Amendment commands that property be not taken without making just compensation. *Valid contracts are property,* whether the obligor be private individual, a municipality, a State or the United States. *Rights against the United States arising out of contract with it are protected by the Fifth Amendment.*" (Emphasis added.)

The appellants, however, blandly conclude that the district court "misapplies the law of takings" (J.S. 9) without demonstrating how the court misapplied the law. Appellants have not cited a single decision to support their statement. Instead, they refer to cases which deal with retroactive application of a congressional act, contracts with private parties, or other totally disparate situations. None of appellants' cited cases involved an express contract to which the United States Government was a party, as is the case here. This fact alone makes the district court's conclusion that there had been a "taking" even more compelling than *Lynch* or *Perry,* and for that matter *United States Trust.*

V

THE DISTRICT COURT CORRECTLY FOUND THAT POSSE PLAINTIFFS WERE PROPERLY BEFORE THE COURT.

Appellants' attempt to challenge POSSE Plaintiffs' standing clearly is misplaced. 42 United States Code section 405(g), which appellants argue is the only mechanism by which POSSE plaintiffs could challenge the Act, manifestly has no application to this case.

In *Matthews v. Eldridge*, 424 U.S. 319, 330 (1976), this Court said:

> "But cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deferences to the agency's judgment is inappropriate. This is such a case.
>
> *"Eldridge's constitutional challenge is entirely collateral to his substantive claim of entitlement. . . ."* (Emphasis added.)

In the case at bar, POSSE Plaintiffs made no "claim of entitlement" at all. They challenged the statute on grounds entirely unrelated to any questions of entitlement. There is no "claim." Thus, there is no need to exhaust any administrative remedies and 42 United States Code section 405(g) is inapplicable. In fact, more than being merely "collateral" as in *Eldridge*, POSSE's constitutional challenge stands independently and alone.

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CONCLUSION

For the reasons set forth above, we respectfully submit that this Court should dismiss the appeal or, in the alternative, affirm the decision of the district court.

Respectfully submitted,

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Counsel of Record

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Attorney General

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Attorneys for Appellee
State of California

No. 85-521

In The

Supreme Court of the United States

October Term, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Appellants,

v.

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.,

Appellees.

UNITED STATES OF AMERICA, ET AL.,

Appellants,

v.

STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

MOTION TO DISMISS OR AFFIRM

ERNEST F. SCHULZKE
660 J Street, Suite 443
Sacramento, CA 95814

Attorney for Appellees Public Agencies Opposed to Social Security Entrapment, et al.

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

PARTIES PLAINTIFF

The list of parties plaintiff in Appellants' Jurisdictional Statement is incomplete. Accordingly, a complete list is hereby submitted as follows:

Public Agencies Opposed to Social Security Entrapment (POSSE)

General Law Cities:

- Alturas
- Arcata
- Lincoln
- San Clemente
- San Anselmo

Charter City:

- Redondo Beach

Special Districts:

- Aromas Tri-County Fire Protection District
- Bear Mountain Recreation and Park District
- Big Bear Municipal Water District
- Delano Mosquito Abatement District
- Humboldt Community Services District
- Marin Municipal Water District
- North Bakersfield Recreation and Park District
- Paradise Irrigation District
- Paradise Recreation and Park District
- Pico Water District
- Placentia Library District
- Rancho Simi Recreation and Park District
- Salispuedes Fire Protection District
- Yorba Linda Library District

Individual Plaintiffs:

- Katherine T. Citizen
- Margie Hunt
- William Rasmussen

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

MOTION TO DISMISS OR AFFIRM

Appellees, Public Agencies Opposed to Social Security Entrapment et al., (POSSE) pursuant to rule 16 of the Rules of the Supreme Court of the United States, hereby

move this Court to dismiss this appeal or to affirm the decision of the United States District Court for the Eastern District of California for the following reason:

This case does not present a substantial federal question.

———o———

INTRODUCTORY STATEMENT

Appellants appeal the decision of the United States District Court for the Eastern District of California, which ruled that Act of Congress (Pub.L. 98-21) section 103(a) and (b) is void and the State of California and its political subdivisions have the lawful right to withdraw from the Old Age, Survivors and Disability Insurance Benefits program of the Social Security Act ("Program") as long as they have met the requirements of the Agreement between the United States and the State of California and the law. It should also be noted that in its Statement of Parties To The Proceedings, Appellants have set forth an incomplete list of the parties. An accurate catalog of the parties appears in the District Court's Opinion. (See Jurisdictional Statement ["J.S."] Appendix A pages 7a through 9a).

———o———

SUMMARY OF ARGUMENTS

Appellees will demonstrate that there is no substance to the arguments raised by Appellants in their J.S. Those arguments are that agreements executed pursuant to 42 United States Code section 418 are not true contracts and,

thus, are subject to congressional modifications at will; or, in the alternative, if they are true contracts, they are nevertheless subject to congressional modification to which courts can give only minimal scrutiny.

Throughout their J.S. they make the further spurious argument that by enforcing the Federal-State Agreement the District Court is foreclosing Congress from amending the *Statute* as distinguished from the *Agreement*. The District Court's opinion cogently refutes all of the issues raised by Appellants, including the latter one.

———o———

STATEMENT REGARDING THE FACTS

Although the Social Security Act (42 U.S.C., 301 et seq.) exempted state and local governments from mandatory participation in the program, in 1950 the Act was amended to permit the United States Secretary of Health and Human Services to enter into agreements with the States whereby the latter could enroll their employees and those of their political subdivisions in the program.

Effective January 1, 1951, the United States entered into such an Agreement ("Agreement") with the State of California ("State"). This Agreement was executed pursuant to 42 United States Code section 418(a) (1) under which the Old Age, Survivors and Disability Insurance Benefits program of the Social Security Act (the "Program") would be extended to public employees if and when the State and its eligible public agencies chose to include them.

As originally enacted and in effect on January 1, 1951, the Agreement permitted the State to withdraw any coverage group, that is, eligible employees of the Appellee public agencies, upon two years' advance notice to the Secretary. (42 U.S.C., 418(g).)

To implement its Agreement, the State enacted enabling legislation (Government Code Sec. 22000-03) pursuant to which Agreement and legislation, the State entered into individual agreements with those public agencies wishing to participate in the Program. The public agencies became enrolled in the Program when the State and the United States modified the state/federal Agreement to include them as a part thereof. (42 U.S.C., 418(c)(4).) The public agencies were required by the State's enabling legislation to make certain "contributions" to the State as payment for their participation. (Government Code Sec. 22551-53.) As permitted by that legislation, the public agencies could withdraw from coverage (and concomitant liability to the State), upon two years' advance notice to the State. (Government Code Sec. 22310.)

Then, in April 1983, Congress enacted Public Law No. 98-21, section 103(a) and (b), amending 42 United States Code section 418(g), to provide that "[n]o agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983." In other words, this amendment prevented any state from withdrawing coverage for any of its employees, or those of its political subdivisions, even if a termination notice had been filed and was pending at the time Public Law No. 98-21, section 103(a) and (b) was enacted.

Through April 1983, the State, which had a section 418 Agreement with the Secretary since 1951, had filed termi-

nation notices on behalf of approximately 200 of its political subdivisions. However, Public Law No. 98-21 prevented the termination from taking place in due course.

The POSSE Appellees then filed suit against the United States and the State of California to challenge the amended section 418(g), which prohibited the State and/or its subdivisions from withdrawing from the Program. Subsequently the State of California also sued the United States.

The District Court decided that the Agreements were contracts and thus properly within the meaning of the Fifth Amendment's Takings Clause. The District Court also found that the right to withdraw was a contractual right and went on to conclude, therefore, that Congress could not deprive the State and its political subdivisions of the right without just compensation. However, the District Court said it could not order "just compensation" in the usual sense because of the unique circumstances. Instead, the Court declared that amended section 418(g) is void and that the State of California and its political subdivisions have the lawful right to withdraw from the Program.

———o———

ARGUMENT

I

INTRODUCTION

In its opinion, the District Court held that apart from the statute, Appellees have a contractual right to withdraw from the Program. It held that even if it be assumed *arguendo* that Congress may by statute terminate a *statu-*

tory right to withdraw, it may not abrogate or repudiate its own agreements entered into pursuant to statutory authorization.

Because this proposition is so clear, simple and undeniable, Appellants have advanced an array of conclusions rather than legal authority to support their thesis that the Agreement is not a contract. (J.S. 10-16.) They also have proffered additional conclusions that even if the Agreement is a contract, they are not bound by its terms because Congress amended section 418(g) for the public good. (J.S. 16-19.)

Moreover, because of their tenuous position, Appellants have referred to three different sets of relationships, and erroneously have used them as though they were virtually interchangeable. Yet each of these relationships has a different legal effect. And this Court consistently has drawn clear distinctions among them. It therefore is vital to recognize their distinct nature and to keep them in their proper context. These relationships are as follows:

1. Express contracts (agreements) to which the Federal Government is by the terms of the contract one of the parties to the contract. It is this type of relationship which is not only at issue in this case but also which this Court consistently has held binds the Federal Government. Accordingly, any decisions of this Court which do not deal with this type of relationship simply are inappropriate.

2. Legislative acts which may or may not confer contractual status upon parties depending upon the statutory language involved. The instant case is not such a case.

3. Contracts between a governmental entity other than the Federal Government and private parties, or strictly between private parties. Again, the instant case is not such a case.

Appellants' Jurisdictional Statement and the District Court's Opinion must be read with these distinctions clearly in focus.

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As the District Court noted, the Agreement executed between Appellants and Appellees evidences an agreement between the parties that each promises to do certain things and to assume certain obligations. "Under any definition of contract, this is a contract. See, *e.g., Wood vs. United States,* 724 F. 2d 1444, 1449 (9th Cir. 1984) (citing *Pennhurst State School & Hospital vs. Holderman,* 451 U.S. 1, 17 (1981))." (*Pub. Agencies Opp. To Soc. Sec. Entrapment vs. Heckler,* 613 F. Supp. 558, 573 (D.C. Cal. 1985).)

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> "Because, as we have demonstrated, neither the Act nor the Basic Agreements created a contract between railroads and the United States, our focus shifts from a case in which we confront an alleged impairment, by the government, of its own contractual obligations, to one in which we face an alleged legislative impairment of a private contractual right. We therefore have no need to consider whether an allegation of a governmental breach of its own contract warrants application of the more rigorous standard of review that the railroads urge us to apply. Instead, we turn to consider whether the payment obligation in 405(f) of the Act unconstitutionally impairs the private contractual rights of the railroads." (*Wood vs. United States,* 724 F. 2d 1444, 1454-1455 (9th Cir. 1984).)

Appellants then urge not only that pursuant to 42 United States Code section 1304, Congress has repealed the termination right but also that contractual arrangements remain subject to subsequent legislation. As far as the former is concerned, there is no doubt that Congress can, within constitutional limits, repeal or modify the Statute. But as the District Court noted:

> "Even if Congress' power to amend the statute is incorporated into the contract, such incorporation does not address the question of whether, when Congress exercises that power, it may deprive the State of its existing contractual rights without compensation. By virtue of the Fifth Amendment, Congress is simply not free to deprive the State of its contractual right without just compensation." (*Pub. Agencies Opp. To Soc. Sec. Entrapment vs. Heckler, supra,* 613 F. Supp. at 574.)

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Next, Appellants rely on certain language from *United States Trust Co. vs. New Jersey,* 431 U.S. 1 (1976) to fortify their sovereign power contentions. But it does not assist them for this Court made clear that,

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So this Court said in adopting a two-pronged test of reasonable and necessary: necessary to achieve the plan and reasonable in light of the circumstances. (*Id.,* at 29.) Here, Appellants presented no evidence whatsoever before the District Court to show that they met the test set out

in *United States Trust.* Further, at issue in *United States Trust* was a "statutory covenant" between two states. There was no Agreement to which the United States was a party. Consequently, the holding of that case is not relevant to the instant case.

Finally, Appellants egregiously misparaphrase language from *National Railroad* with their statement that "when a contract is impaired by federal legislation, 'the judicial scrutiny [is] quite minimal.' (*National Railroad Passenger Corp.,* slip op. 21.)" (J.S. 16.) The truth of the matter is that this Court said: *"When the contract is a private one, and when the impairing statute is a federal one,* this next inquiry is especially limited, and the judicial scrutiny quite minimal." (*Id.,* 105 S. Ct. at 1455.)

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Most importantly, this Court has observed on previous occasions that "impairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties. . . ." (*Allied Structural Steel Co. vs. Spannaus,* 438 U.S. 234, 244, fn. 15 (1977).)

Thus, when analyzing the issues raised herein, it must be borne in mind that here *we are here dealing with a*

contractual Agreement between the United States and the Appellees, a circumstance which is governed by tests which are different from those discussed at length by Appellants in their Jurisdictional Statement. It follows that the cases cited by Appellants are inapposite to the instant case. Their failure to make this vital distinction is fatal to Appellants' challenge to the District Court's Opinion.

III

THE DISTRICT COURT PROPERLY FOUND THAT THE APPELLANTS ARE BOUND BY THEIR CONTRACTUAL OBLIGATIONS

The principle is well established that the United States and its duly appointed agents are bound by their contractual obligations. Years ago in *Perry vs. United States,* 294 U.S. 330, 350 (1935), this Court said:

> "On that reasoning, if the terms of the Government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to the amount to be paid may also be repudiated. The contention necessarily imports that the Congress can disregard the obligations of the Government at its discretion and that, when the government borrows money, the credit of the United States is an illusory pledge.
>
> "We do not so read the Constitution. . . . To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, *a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government. . . .*" (Emphasis added.)

Perry recognized the principle that:

> "When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties

to such instruments. • • • " (See *Perry, supra* at 352.)

This Court in *Perry* further noted that in *Lynch vs. United States,* 292 U.S. 571, 580 (1934), which centered around the severe economics of the depression, this Court had said:

> "No doubt there was in March, 1933, great need of economy . . . But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. *To abrogate contracts, in the attempt to lessen Government expenditure, would be not the practice of economy, but an act of reputation. . . .*" (Emphasis added.)

This principle was again recognized by this Court in *National Railroad Corp. vs. Atchison, T. & S.F. Ry. Co., supra,* — U.S. —, 105 S. Ct. 1455, fn. 24:

> "There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements. . . . To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government. *Perry vs. United States,* 294 U.S. 330, 350-351, 55 S. Ct. 432, 434-435, 79 L. Ed. 912 (1935)."

In spite of this long standing state of the law, Appellants seek to circumvent their obstacle by claiming that 42 United States Code section 1304 gives Congress the right to change contracts as well as statutes. This Court described a similar contention as being absurd: "A promise to pay, with

a reserved right to deny or change the effect of the promise, is an absurdity." (*Murray v. Charleston,* 96 U.S. 432, 445, cited with approval in *United States Trust Co. vs. New Jersey, supra,* 431 U.S. 1, 24.)

Appellants' last defense is based on the "general welfare" or "for the good of the people" argument. This, too, is as untenable as their other contentions. As trying as the economic climate has been in recent years, it pales in comparison with the utter despair of the 1930's. Yet, this Court in *Perry vs. United States, supra,* 294 U.S. 330, did not find those truly extreme economic conditions as justification for repudiating or even substantially altering the contractual obligations of the United States.

To argue, as do appellants, that the change of a key provision in a contract without which Appellees would not have entered into the Program's domain is not a repudiation is to argue that nothing in a contract really matters unless the United States so wants it. Of course, that is total nonsense. Where substantial prejudice occurs, as it does here with the elimination of the withdrawal provision, the unilateral change sought by the Congress obviously results in a repudiation of the contract. Nothing could be clearer in this regard than this Court's statement that, "To abrogate contracts, in the attempt to lessen government expenditures, would be not the practice of economy, but an act of *repudiation.*" (*Perry vs. United States, supra,* 294 U.S. at 352-353; emphasis added.)

IV

THE DISTRICT COURT PROPERLY FOUND THAT CONTRACTS WITH THE UNITED STATES ARE VESTED PROPERTY RIGHTS AND THEIR TAKING WITHOUT DUE PROCESS OF LAW AND/OR JUST COMPENSATION VIOLATES THE FIFTH AMENDMENT.

The District Court correctly found that there was a "taking" without just compensation in this case. As this Court said in *Lynch vs. United States, supra,* 292 U.S. at 576-577:

> "The Fifth Amendment commands that property be not taken without making just compensation. *Valid contracts are property,* whether the obligor be private individual, a municipality, a state, or the United States. *Rights against the United States arising out of contract with it are protected by the Fifth Amendment.*" (Emphasis added.)

The Appellants, however, blandly conclude that the District Court "misapplies the law of takings" (J.S. 9) without demonstrating how the Court misapplied the law. Appellants have not cited a single decision to support their statement. Instead, they refer to cases which deal with retroactive application of a congressional act, contracts with private parties, or other totally disparate situations. None of Appellants' cited cases involved an express contract to which the United States Government was a party, as is the case here. This fact alone makes the District Court's conclusion that there had been a "taking" even more compelling than *Lynch* or *Perry,* and for that matter *United States Trust.*

V

THE DISTRICT COURT CORRECTLY FOUND THAT POSSE PLAINTIFFS PROPERLY WERE BEFORE THE COURT.

The District Court held that POSSE plaintiffs have standing "at least as third-party beneficiaries of the contract, if not actual contracting parties." *Public Agencies Opposed to Social Security Entrapment, et al. vs. Heckler, et al.,* 613 F. Supp. 558 at 570 (D.C. Cal. 1985). Appellants have not challenged that holding. Instead they argue that 42 United States Code section 405(g) is the only mechanism by which POSSE plaintiffs could challenge the Act. Even a cursory reading of Section 405 reveals that that section has no relevance to the instant case.

That section governs "evidence and procedure for *establishment of benefits.*" (Emphasis supplied.) The procedure is limited to the determination of *entitlement to benefits.* It has no relation to constitutional challenges to the statute itself.

To argue that in order to challenge the constitutionality of a statutory provision one first must claim a benefit is an absurdity.

In *Mathews vs. Eldridge,* 424 U.S. 319, 330 (1976), this Court said:

> "But cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate. This is such a case.
>
> "*Eldridge's constitutional challenge is entirely collateral to his substantive claim of entitlement. . . .*" (Emphasis added.)

In the case at bar, POSSE Plaintiffs made no claim of entitlement to benefits. They challenged the statute on grounds entirely unrelated to any questions of entitlement. It follows that there is no need to exhaust administrative remedies and that 42 United States Code section 405(g) is inapplicable. In fact, the instant case is more compelling than *Eldridge*. Rather than being merely "collateral" as in *Eldridge*, POSSE's constitutional challenge stands independently and alone.

VI

THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

Appellees have demonstrated that the conclusions of the District Court are consistent with and dictated by the decisions of this Court.

1. There is a contractual relationship between the United States and Appellees.
2. Congress is not free to repudiate that Agreement.
3. The repudiation constitutes a "taking."
4. The Statute is therefore void.
5. The District Court has not impaired the ability of Congress, within constitutional limits, to amend the Statute as distinguished from the Agreement.

The foregoing makes irrelevant Appellants' claim that the financial impact of the decision is "immense." But even were it relevant, the claim is inconsistent with their assertion that Congress could force everyone into the Program simply by enacting new legislation. (J.S. 15.) By that argument, the power to change the Program and thereby control any financial impact squarely would be within the Congress' hands.

CONCLUSION

For the reasons set forth above, Appellees respectfully submit that this Court should dismiss the appeal or, in the alternative, affirm the decision of the District Court.

DATED: November 11, 1985

Respectfully submitted,

ERNEST F. SCHULZKE

Attorney for Appellees
Public Agencies Opposed to
Social Security Entrapment,
et al.

No. 85-521

In the Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

STATE OF CALIFORNIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED SEPTEMBER 25, 1985
JURISDICTION NOTED DECEMBER 2, 1985

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-521

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TABLE OF CONTENTS FOR JOINT APPENDIX *

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* The district court order and judgment and the notice of appeal were attached as appendices to the jurisdictional statement and are not reproduced herein.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. Civil S-83-406 LKK

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL., PLAINTIFFS

v.

MARGARET HECKLER, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1983		
4-22	1	Complaint, sums iss'd, filed ref to mag
5-13	2	AMENDED COMPL; summ's iss'd
6-9		LDG: sitp ext time to ans
6-10	3	ORDER: ext time to ans to 7/12/83 to ans
6-11	4	ANSWER
7-18	5	Deft's stip to ext time to resp to 7/26/83
7-25	6	ANSWER (Fed defts)
8-29	7	Pltf's notc & mot/PI for 9/26/83 at 10; p/a
9-14	8	ORDER: PI vacated; mots due 10/17/83; hrg set 11/16/83 at 9
9-26		MINUTES: mots off calendar
10-17	9	Fed deft's mot/SJ for 11/16/83 at 9

DATE	NR.	PROCEEDINGS
1983		
	10	Pltf's notc & mot/SJ for 11/16/83 at 9; p/a; aff
	11	Pltf's exhibit a to declar of R. Baker in support
10-31	12	Deft's notc & mot/dism for 11/16/83 at 9
	13	Real Parties memo of p/a in oppo to mot/SJ etc
	14	Pltf's memo in oppo to mot/SJ
11-7		LDG: stip ext time
11-8	15	ORDER: ext time to reply to x-mot/SJ to 11/9/83
11-9	16	Fed deft's reply to pltf oppo to SJ mot
	17	Pltf's reply memo of defts in oppo to pltfs mot
	18	Pltf's oppo to fed deft mot/dism and reply to oppo to pltfs mot/SJ
11-16		MINUTES: pltf and deft mot/SJ; dism and PI submitted; ord by crt
11-17	19	ORDER: adding pltfs; pltf atty to amend amended compl
11-30		LDG: stip ext time to file brief
12-7	20	Pltf's post-hrg mem re: mot/PI and SJ
	21	Pltf's affs
	22	Pltf's exhibits A and B submitted w/pltf memo re: mots
	23	Fed Deft's supmntal oppo to pltf's mot/PI
12-8	24	ORDER: ext time to file briefs
12-14	25	Pltf's reply to supmntal oppo to mot PI
	26	Pltf's aff of R. Ramirez in support of mot/PI
12-29	27	Fed deft's supmntal oppo to mot/SJ

DATE	NR.	PROCEEDINGS
1984		
1-4	28	Pltf's amendment to Amended Complaint (add pltfs)
3-23		Rec'd ltr fr G. Hollows to N. Camp (LKK)
1985		
3-4	29	*ORDER*: USA to notify crt re Commerce Clause w/i 30 days; parties to submit briefs re Garcia w/i 45 days
3-12	30	*ORDER*: previous ord of crt dated 3/4/85 is VACATED; parties may file briefs re Garcia; briefs due w/i 30 days; no briefs shall be longer than 25 pages
4-5		LDG: ord ext time to file briefs
4-11	31	Fed deft resp to ord of 3/12/85
4-15	32	*ORDER*: parties grntd two weeks additional to file briefs responding to issues raised by crt
4-22	33	Pltf State of CA resp to ord of 3/12/85
4-30	34	Pltf resp to ord inviting briefs
5-29	35	*ORD*: relate to 83-776-LKK and 85-685-EJG and reassign 85-685 to LKK
	36	*ORD*: challenged act of congress is void and of no effect to these pltfs; Secretary of HHS is ord to accept notifications of withdrawal; remaining motions are moot
5-31	37	*JUGT ENT*: 5/31; notc sent
6-27	38	*NOTICE OF APPEAL* to Supreme Court
7-26	39	*NOTICE OF APPEAL* to Federal Circuit
12-5		Rec'd ltr fr Edward Faircloth re cert copy attached noting probable jurisdiction

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. Civil S-83-776 LKK

STATE OF CALIFORNIA, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1983		
7-14	1	COMPLAINT; summs iss'd (to LKK)
	2	Pltf's notc of related cases w/83-406 LKK
8-12	3	Rtn summons—DAG—7/15/83
	4	Rtn summons—HHS—7/15/83
	5	Rtn summons—HHS—7/15/83
9-14	6	ANSWER (HHS)
	7	ORDER: set hrg 11/16/83 at 9 for mots to be filed by 10/17/83
10-17	8	Pltf's notc & mot/SJ for 11/16/83 at 9
	9	Deft's mot/SJ for 11/16/83 at 9
10-20		Rec'd ltr fr P. Dobson re: corrections to mot/SJ
10-31	10	Deft's notc & mot/dism for 11/16/83 at 9
	11	Pltf's memo of p/a in oppo to mot/SJ
11-7		LDG: stip ext time
11-8	12	ORDER: ext time to reply to x-mot/SJ to 11/9/83

DATE	NR.	PROCEEDINGS
1983		
11-9	13	Fed deft's reply to pltf's oppo to SJ mot
	14	Pltf memo of p/a in oppo to mot/dism
11-10		Rec'd memo fr P. Dobson re: memo declar of serv
	15	Corrected declar of serv
11-16		MINUTES: deft & pltf mot/SJ; dism; PI submitted 12/16/83; ord by crt
1984		
6-5		Rec'd ltr fr Albert Clark re decision (LKK)
3-4	16	*ORDER*: USA to notify crt re Commerce Clause w/i 30 days; parties to submit brief re Garcia w/i 45 days
3-12	17	*ORDER*: ord of 3/4 is vacated; parties may file briefs re Garcia w/i 30 days; no brief may be longer than 25 pages
4-5		LDG: ord ext time to file briefs
1985		
4-15	18	*ORDER*: parties grntd two weeks additional to file briefs responding to issues raised by crt
4-22	19	State of CA resp to ord of 3/12
4-30	20	Pltf resp to ord re briefs
5-29	21	*ORD*: challenged act of congress is void and of no effect to these pltfs; Secretary of HHS is ord to accept notifications of withdrawal; remaining motions are moot.
	22	*ORD*: relate to 83-406-LKK and 85-685 and reassign 85-685 to LKK
5-31	23	*JUDGT ENT*: 5/31; notc sent
6-27	24	*NOTICE OF APPEAL*—to Supreme Court
7-26	25	*NOTICE OF APPEAL*: To Federal Circuit

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIVS-83-406 LKK

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT (POSSE), an Unincorporated Voluntary Association; and YORBA LINDA LIBRARY DISTRICT, a Special District organized under the laws of the State of California; and NORTH BAKERSFIELD RECREATION AND PARK DISTRICT, a Special District organized under the laws of the State of California; and DELANO MOSQUITO ABATEMENT DISTRICT, a Special District organized under the laws of the State of California; and KATHERINE T. CITIZEN, in her capacity as Library Director of the YORBA LINDA LIBRARY DISTRICT, and in her capacity as an individual; and WILLIAM RASMUSSEN, in his capacity as General Manager of the NORTH BAKERSFIELD RECREATION AND PARK DISTRICT, and in his capacity as an individual; and MARGIE HUNT, in her capacity as Acting Director of DELANO MOSQUITO ABATEMENT DISTRICT, and in her capacity as an individual, PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA; and MARGARET HECKLER, in her capacity as Secretary of the Department of Health and Human Services, United States Government, and JOHN SVAHN, in his capacity as Undersecretary of the Department of Health and Human Services, United States Government, and in his capacity as Commissioner of the Social Security Administration, United States Government, DEFENDANTS

THE STATE OF CALIFORNIA; GEORGE DEUKMEJIAN, in his capacity as Governor of the State of California and MICHAEL FRANCHETTI, in his capacity as Director of Finance for the State of California; and BOARD OF ADMINISTRATION, PUBLIC EMPLOYEES' RETIREMENT SYSTEM, STATE OF CALIFORNIA; and ROBERT F. CARLSON, BILL D. ELLIS, MICHAEL FRANCHETTI, JAKE PETROFINO, PRESCOTT R. REED, WILSON C. RILES, JR., MEL REUBEN, JACK G. WILLARD, BRENDA Y. SHOCKLEY, and SUSAN TOHBE in their capacity as members of the Board of Administration, Public Employees' Retirement System of the State of California, REAL PARTIES IN INTEREST

AMENDED COMPLAINT FOR DECLARATORY RELIEF; AND PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF; AND FOR SPECIFIC PERFORMANCE OF CONTRACT

COMPLAINT FOR:

A. *DECLARATORY JUDGMENT* THAT THE 1983 AMENDMENTS TO SECTION 218(g) OF THE SOCIAL SECURITY ACT ARE UNCONSTITUTIONAL IN THAT THEY:

1. DEPRIVE DEFENDANTS OF THEIR CONTRACT RIGHTS WITHOUT DUE PROCESS OF LAW (FIFTH AMENDMENT); and
2. DENY THE INDIVIDUAL PLAINTIFFS THE EQUAL PROTECTION OF LAW (FIFTH AMENDMENT); and
3. ATTEMPT TO REGULATE ESSENTIAL STATE AND LOCAL GOVERNMENT FUNCTIONS IN AREAS WHICH ARE RESERVED TO THE JURISDICTION OF THE STATES (TENTH AMENDMENT).

B. *PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF.*

C. *SPECIFIC PERFORMANCE* OF CONTRACTUAL OBLIGATION OF UNITED STATES GOVERNMENT.

FACTS COMMON TO ALL CAUSES OF ACTION

1. This action arises under Section 218 of the Social Security Act, as amended in 1983 (hereinafter "Act"), which is set forth in 42 U.S.C., Sec. 418.

2. This action further arises under the Constitution of the United States and the Fifth and Tenth Amendments to the Constitution of the United States. The matter in controversy, exclusive of interest and costs, exceeds the sum of ten thousand dollars; this Court has jurisdiction under 28 U.S.C., Sec. 1331. Jurisdiction is also based on Sec. 1346 of Title 28, United States Code, which provides that the District Courts shall have original jurisdiction of any other civil action founded either upon the Constitution or any act of Congress; and on the Federal Declaratory Judgment Act (28 U.S.C., Sec. 2201 and 2202) and the laws of the United States of America.

3. The provisions of Public Law 98-21, amending Section 218 of the Act, and amending 42 U.S.C., Sec. 418 (hereafter "1983 Amendments"), which are the subject matter of this action, became effective on or about April 20, 1983. Plaintiffs challenge specifically the constitutionality of the following provisions of the Act as amended:

Duration of Agreements for Coverage
of State and Local Employees

Sec. 103(a). Section 218(g) of the Social Security Act is amended to read as follows:

"Duration of Agreement.

"(g) No agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after the date of the enactment of the Social Security Amendments of 1983."

(b) The amendment made by subsection (a) shall apply to any agreement in effect under section 218 of the Social Security Act on the date of the enactment of this Act, without regard to whether a notice of termination is in effect on such date, and to any agreement or modification thereof which may become effective under such section 218 after that date.

4. Plaintiff PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT (hereafter "POSSE") is an unincorporated voluntary association with headquarters in Sacramento, California. The individual members of POSSE include local government entities and/or agencies which share the concern that the removal of the option to withdraw from Social Security is an infringement on the constitutional rights held by and/or functions performed by state and local government entities. Among the primary purposes of POSSE is the preservation and protection of the contractual and constitutional rights of state and local governments to withdraw from the Social Security system. The interests of plaintiff POSSE and its members are and will be materially and adversely affected by the implementation of the 1983 Amendments. POSSE has a direct and substantial beneficial interest in ensuring that actions of government relative to participation of local governments in Social Security be undertaken only in conformance with applicable constitutional provisions, and in conformance with existing contractual relationships. POSSE brings this action on its behalf and on behalf of each of its member public entities.

5. Plaintiff YORBA LINDA LIBRARY DISTRICT (hereafter "YORBA LINDA"), is a Special District

organized under the laws of the State of California, serving the City of Yorba Linda, California. As a political subdivision of California, it shares in that State's sovereignty and performs essential functions which are necessary and indispensable to its existence as a political subdivision of California. Its unique needs and the needs of the people it serves vary from the needs of other political subdivisions within California and are distinct from the needs of political subdivisions of each of the other United States. Its Government structure and demography require unique policy and personnel management decisions which may vary from those of other political subdivisions within California and which in many respects differ from those made by political subdivisions of the other United States. It is not in competition with any other political subdivisions within or without California or any private enterprise when making these decisions or performing these essential functions. Instead, it acts through the republican form of its State Government in conjunction with its own Government, through officials elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the California borders into any other State.

6. Plaintiff NORTH BAKERSFIELD RECREATION AND PARK DISTRICT (hereafter "North Bakersfield") is a Special District organized under the laws of the State of California, serving the 120 square mile area contiguous with and north of the City of Bakersfield, California. As a political subdivision of California, it shares in that State's sovereignty and performs essential functions which are necessary and indispensable to its existence as a political subdivision of California. Its unique needs and the needs of the people it serves vary from the needs of other political subdivisions within California and are distinct from the needs of political sub-

divisions of each of the other United States. Its Government structure, geography, climate, topography, and demography require unique policy and personnel management decisions which may vary from those of other political subdivisions within California and which in many respects differ from those made by political subdivisions of the other United States. It is not in competition with any other political subdivisions within or without California or any private enterprise when making these decisions or performing these essential functions. Instead, it acts through the republican form of its State Government in conjunction with its own Government, through officials elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the California borders into any other State.

7. Plaintiff DELANO MOSQUITO ABATEMENT DISTRICT (hereafter, "DELANO") is a Special District, organized under the laws of the State of California, serving a 420 square mile area in the Southern San Joaquin Valley, comprising parts of Tulare and Kern County. As a political subdivision of California, it shares in that State's sovereignty and performs essential functions which are necessary and indispensable to its existence as a political subdivision of California. Its unique needs and the needs of the people it serves vary from the needs of other political subdivisions within California and are distinct from the needs of political subdivisions of each of the other United States. Its Government structure, geography, climate, topography, and demography require unique policy and personnel management decisions which may vary from those of other political subdivisions within California and which in many respects differ from those made by political subdivisions of the other United States. It is not in competition with any other political subdivisions within or without California or any private

enterprise when making these decisions or performing these essential functions. Instead, it acts through the republican form of its State Government in conjunction with its own Government, through officials elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the California borders into any other State.

8. Plaintiff KATHERINE T. CITIZEN is the Library Director of YORBA LINDA, and as such has responsibility for the administration of library services within the District. CITIZEN complains also in her capacity as an individual resident within YORBA LINDA, and employee of YORBA LINDA presently required to contribute money to the Social Security system.

9. Plaintiff WILLIAM RASMUSSEN is the General Manager of NORTH BAKERSFIELD, and as such has responsibility for the administration of the services rendered by that District. RASMUSSEN complains also in his capacity as an individual resident within NORTH BAKERSFIELD, and employee of NORTH BAKERSFIELD presently required to contribute money to the Social Security system.

10. Plaintiff MARGIE HUNT is the Acting Director of DELANO, and as such has responsibility for the administration of services performed by the District. HUNT complains also in her capacity as an individual resident within DELANO, and employee of DELANO presently required to contribute money to the Social Security system.

11. Defendant THE UNITED STATES OF AMERICA is a body politic and an entity capable of entering into and being bound by contractual relationships.

12. Defendant MARGARET HECKLER is the Secretary of the Department of Health and Human Services of the United States of America, who is charged by law with the implementation and enforcement of the Act.

13. Defendant JOHN SVAHN is Undersecretary of the Department of Health and Human Services and is Commissioner of the Social Security Administration of the United States of America, who is charged by law with the implementation and enforcement of the Act.

14. Real party in interest, The State of California, is a body politic and an entity capable of entering into and being bound by contractual relationships.

15. Real party in interest, GEORGE DEUKMEJIAN, is the duly elected and acting Governor of the State of California and is charged by Article V, Section 1 of the California Constitution to faithfully execute the laws of said State.

16. Real party in interest, MICHAEL FRANCHETTI is the duly appointed Director of the Department of Finance of the State of California and as such has the power and duty to supervise the fiscal and business policies of the State.

17. Real party in interest, BOARD OF ADMINISTRATION, PUBLIC EMPLOYEES' RETIREMENT SYSTEM, STATE OF CALIFORNIA, is that agency within the State of California which has the responsibility for administering the Social Security laws on behalf of the State of California. Said Board is comprised of ten duly appointed members as follows: ROBERT F. CARLSON, BILL D. ELLIS, MICHAEL FRANCHETTI, JAKE PETROFINO, PRESCOTT R. REED, WILSON C. RILES, JR., MEL REUBEN, JACK G. WILLARD, BRENDA Y. SHOCKLEY, and SUSAN TOHBE.

By virtue of their membership on the said Board, said real parties in interest have responsibility for administering the Social Security laws on behalf of the State of California.

18. Plaintiff Special Districts provide the following essential Government services, among others, each of which will be affected in cost or quality, or both, by the 1983 Amendments to the Act: Park maintenance and development; general recreational supervision; early childhood education programs; cultural development programs; Senior Citizens programs; organized competitive sports

and library services; educational programs; and mosquito control and abatement.

19. These essential Government services inhere in the existence of States and their political subdivisions. Without these essential Government services a State could not exist for the protection and benefit of the people within the territory of the State.

20. States and Special Districts, as political subdivisions of a State, cannot fail or refuse to provide these essential Government services consistently with provisions of State Constitutions, laws, charters, ordinance provisions and provisions of the United States Constitution.

21. Plaintiff Special Districts have exercised their sovereign judgment in establishing and seeking out benefit programs for their employees which will insure the most effective provision of essential Government services at the least cost to the taxpayers of said Plaintiffs, consistently with fairness in compensating and regulating the working hours and conditions of the employees of said Plaintiffs who provide essential Government services.

22. The Social Security Act was originally enacted in 1935. It has been amended several times since its original enactment. Under the original Act and under amendments prior to the 1983 Amendments, State and local government entities and/or agencies were specifically and unqualifiedly given the right to withdraw from the Social Security system upon specified conditions.

23. The facts set forth in this complaint demonstrate the irreparable harm imposed upon Plaintiffs for which Plaintiffs have no adequate remedy at law. Plaintiffs are entitled to the relief prayed for herein.

FIRST CAUSE OF ACTION
(DUE PROCESS OF LAW—FIFTH AMENDMENT)

24. Plaintiffs incorporate all of the allegations contained in paragraphs 1 through 23 hereof at this point by this reference.

25. On or about March 9, 1951, the United States of America (hereafter USA), acting through its authorized agent and pursuant to the provisions of the Social Security Act, entered into an Agreement with the State of California, acting through its authorized agent and pursuant to the laws of the State of California and of the United States, whereby the State of California entered the Social Security system. A copy of said Agreement is marked Exhibit A, is attached hereto and incorporated herein by this reference.

26. The said Agreement provides, at Paragraph (F) thereof, that the State "upon giving at least two years' advance notice," may terminate the Agreement and thereby withdraw from the system, "either in its entirety or with respect to any coverage group."

27. On or about August 16, 1955, the State of California, acting through its authorized agent, entered into an Agreement with Plaintiff YORBA LINDA (Mod. No. 61) by which YORBA LINDA was incorporated into the Social Security system. Said Agreement provides that YORBA LINDA, "upon giving at least two years' advance notice" may terminate the Agreement and thereby withdraw from the system. On or about October 13, 1955, the USA, acting through its duly authorized agent, signed and thereby ratified said Mod. No. 61, thereby incorporating it into the original Agreement with the State of California, and having the effect of making YORBA LINDA a party to said original Agreement between the USA and the State of California.

28. On or about March 14, 1958, the State of California, acting through its authorized agent, entered into an Agreement with Plaintiff NORTH BAKERSFIELD (Mod. No. 204) by which NORTH BAKERSFIELD was incorporated into the Social Security system. Said Agreement provides that NORTH BAKERSFIELD, "upon giving at least two years' advance notice" may terminate the Agreement and thereby withdraw from the system. On or about March 24, 1958, the USA, acting through its

duly authorized agent, signed and thereby ratified said Mod. No. 204, thereby incorporating it into the original Agreement with the State of California, and having the effect of making NORTH BAKERSFIELD a party to said original Agreement between the USA and the State of California.

29. On or about March 20, 1956, the State of California, acting through its authorized agent, entered into an Agreement with Plaintiff DELANO (Mod. No. 93) by which DELANO was incorporated into the Social Security system. Said Agreement provides that DELANO, "upon giving at least two years' advance notice" may terminate the Agreement and thereby withdraw from the system. On or about April 4, 1956, the USA, acting through its duly authorized agent, signed and thereby ratified said Mod. No. 93, thereby incorporating it into the original Agreement with the State of California, and having the effect of making DELANO a party to said original Agreement between the USA and the State of California.

30. Pursuant to the provisions of the aforementioned Agreements, during the year 1982, Plaintiffs YORBA LINDA, NORTH BAKERSFIELD, and DELANO gave notice of termination to the State of California, represented in this instance by the Board of Administration, Public Employees' Retirement System, of their intent to terminate their participation in the Social Security System, effective December 31, 1984. Said Plaintiffs complied with all of the conditions for such termination notice set forth in the Agreements.

31. By enacting Public Law 98-21, specifically the provisions set forth in paragraph 3, supra, the USA, represented by Defendants herein, has deprived or threatens to deprive said Plaintiffs of their contractual rights. By thus repudiating their contractual obligations, they have taken property of said Plaintiffs without just compensation and thereby violated Plaintiffs' rights under Amendment V to the Constitution of the United States.

SECOND CAUSE OF ACTION
(EQUAL PROTECTION—FIFTH AMENDMENT)

32. Plaintiffs incorporate all of the allegations contained in paragraphs 1 through 30 hereof at this point by this reference.

33. Under the 1983 Amendments to the Act, public entities and/or agencies which already had completed the termination process, and thereby had withdrawn from the Social Security System, or which never had joined the system, were allowed to remain outside the system with no obligation to participate therein.

34. Individual employees of such entities and/or agencies are not under mandate to make contributions to the Social Security system, and are, therefore, free to use the monies which they otherwise would be forced to contribute to that system to build an estate for themselves and their heirs, according to the dictates of their judgment and desires and conscience.

35. The individual Plaintiffs herein, on the other hand, who have comparable employment with public entities and/or agencies have been deprived of the opportunity to use their money, because they are forced to contribute to the Social Security system. They thereby are being denied the equal protection of law contrary to the provisions of the Constitution of the United States.

THIRD CAUSE OF ACTION
(TENTH AMENDMENT)

36. Plaintiffs incorporate all of the allegations contained in paragraphs 1 through 30 hereof at this point by this reference.

37. Under the Tenth Amendment to the Constitution of the United States, one of the most vital sovereign powers reserved to the States is the power to employ personnel to carry out essential governmental functions and to completely control the benefits of such employees,

including those similar to those covered by the federal Social Security System.

38. State and local government entities have developed policies and laws, including civil service laws, designed to take care of the unique governmental situation in each geographic and political area. The 1983 Amendments purport to nullify the ability of States and local governments to make decisions relating to retirement and other benefits for their employees.

39. Plaintiffs YORBA LINDA, NORTH BAKERSFIELD, and DELANO operate under California constitutional and statutory law provisions and local policies in providing essential governmental services and in performing other functions through their employees. Said Plaintiffs have determined that they could, by terminating their participation in the Social Security system, save money extracted from the taxpayers of their respective districts, and apply said money to other priority uses, and/or provide greater benefits for their employees at a lesser or equal cost. Pursuant to that considered decision, they filed the aforementioned notices of termination of coverage under the Social Security system.

40. The 1983 Amendments change control of State and local employee benefits from State and local governments to Federal control. For the first time in over 200 years, the Federal Government is claiming power over this vital internal State and local function. No more vital internal function of government exists for State and local governments than control of their employees and the budget items relating to said employees. By seizing control of a vital aspect of that function through the enactment of the 1983 Amendments, the USA, through its representatives named as Defendants herein, have and threaten to violate Amendment X of the U.S. Constitution.

41. By taking control over the monies which would be saved through withdrawal from the Social Security system, the USA will impair and make impossible the

use of those funds for other vital services rendered by local government entities.

42. The 1983 Amendments, if allowed to have effect, will cause Plaintiff YORBA LINDA, NORTH BAKERSFIELD, and DELANO irreparable injury and damage and will irreparably injure and damage all State and local entities situated similarly to said Plaintiffs. The said Amendments will cause either increased costs for services, or a diminishing in quality and/or quantity of service. Said Amendments further will force said Plaintiffs to forego planned services.

43. The great diversity of State and local governments makes full computation of the nationwide impact of the 1983 Amendments impossible. Plaintiffs hereby request leave to amend this complaint to incorporate representative projections of such costs at such time as they become available.

44. Plaintiffs further are irreparably harmed in that if they elect to enforce the terms of their Agreement with the Federal and State Governments, and at the end of the termination period refuse to make further contributions to the Social Security system, they will be subject to fines and other penalties, as well as civil liability. Plaintiffs have no adequate remedy at law. They are entitled to a judgment adjudicating their rights and an injunction to prevent Defendants and Real Parties in Interest from enforcing this unconstitutional act against Plaintiffs.

FOURTH CAUSE OF ACTION
(SPECIFIC PERFORMANCE)

45. Plaintiffs incorporate all of the allegations contained in paragraphs 1 through 30 hereof at this point by this reference.

46. Defendants and Real Parties in Interest are obligated under the aforementioned Agreements, to allow Plaintiff Districts to terminate their Social Security participation as of December 31, 1984.

47. At the time the Agreements were entered into, they were just and reasonable to all parties involved, and the consideration therefor was adequate.

48. Plaintiffs have duly performed all of the conditions of the Agreement on their part to be performed.

49. If Defendants and Real Parties in Interest are not required to perform according to the terms of the Agreements, Plaintiffs will suffer great and irreparable injury and damage for which they have no adequate remedy at law.

WHEREFORE, Plaintiffs demand judgment against Defendants, and each of them, and against Real Parties in Interest, as follows:

1. Declaring that the 1983 Amendments to Section 218(g) of the Social Security Act are unconstitutional in that they:

a. Deprive Plaintiffs of their contract rights without due process of law, thereby taking their property without just compensation; and

b. Deny the individual Plaintiffs the equal protection of law; and

c. Attempt to regulate essential and traditional State and local government functions in areas which are reserved by the Constitution to the jurisdiction of the States; and

2. Preliminary and permanent enjoining of Defendants and Real Parties in Interest from enforcing or attempting to enforce the Act against Plaintiffs or those situated similarly to Plaintiffs; and

3. Ordering Defendants and Real Parties in Interest to conform to the terms of the Agreements by allowing Plaintiffs and others similarly situated to terminate their Social Security participation pursuant to the terms of the Agreements.

4. Such additional relief as the facts alleged herein may warrant.

Dated: May 12, 1983

/s/ Ernest F. Schulzke
ERNEST F. SCHULZKE
Attorney for Plaintiffs

JOHN K. VAN DE KAMP, Attorney General
of the State of California
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CIVS-83-776 KK

STATE OF CALIFORNIA, PLAINTIFF

v.

THE UNITED STATES OF AMERICA; MARGARET HECKLER, in her capacity as Secretary of the DEPARTMENT OF HEALTH AND HUMAN SERVICES of the United States of America, and JOHN SVAHN, in his capacity as Undersecretary of the DEPARTMENT OF HEALTH AND HUMAN SERVICES, of the United States of America, and in his capacity as Commissioner of the SOCIAL SECURITY ADMINISTRATION of the United States of America, DEFENDANTS

[Filed July 14, 1983]

COMPLAINT FOR DECLARATORY JUDGMENT, FOR RELIEF IN THE NATURE OF MANDAMUS, AND FOR A PRELIMINARY AND PERMANENT INJUNCTIONS

Plaintiff alleges:

JURISDICTION

1. This action arises under section 218 of the Social Security Act as amended in 1983 (hereafter "Act"), which is set forth in title 42, United States Code, section 418. Plaintiff seeks a declaratory judgment that section 218 of the Act violates the Tenth Amendment of the United States Constitution.

2. Thus, this action further arises under the Tenth Amendment of the United States Constitution. This court has jurisdiction under title 28, United States Code, sections 1331, 1346, 1361, 2201 and 2202.

3. The provisions of Public Law 98-21, amending section 218 of the Act, and amending title 42 United States Code, section 418, which are the subject matter of this action, became effective on or about April 20, 1983. Plaintiff challenges the constitutionality of section 103(a) of Public Law 98-21 which provides:

"Sec. 103. (a) Section 218(d) of the Social Security Act is amended to read as follows:

'Duration Of Agreement

'(g) No agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after the date of the enactment of the Social Security Amendments of 1983.'

"(b) The amendment made to subsection (a) shall apply to any agreement in effect under section 218 of the Social Security Act on the date of the enactment of this act, without regard to whether the notice of termination is in effect on such date, and to any agreement or modification thereof which may become effective under section 218 after that date."

PARTIES

4. Plaintiff, State of California, is a sovereign state of the United States of America.

5. Defendant United States of America is a body politic possessing those powers granted to it by the sovereign states of the United States and enumerated in the Constitution of the United States.

6. Defendant Margaret Heckler is the Secretary of the Department of Health and Human Services of the United States of America and is charged by law with implementation and enforcement of the Act.

7. Defendant John Svahn is Undersecretary of the Department of Health and Human Services and is Commissioner of the Social Security Administration of the United States of America, and is charged by law with the implementation and enforcement of the Act.

CLAIM FOR RELIEF

8. On or about March 9, 1951, defendant United States of America, acting by and through the Federal Security Administrator, by virtue of the authority vested in the Administrator by Section 218 of the Act, and plaintiff State of California, acting by and through the Director of Finance of the State of California by virtue of the authority of chapter 46, California Statutes of 1950, 3rd Extra Session, voluntarily entered into an agreement to provide Social Security coverage for certain public employees of the State of California, its political subdivisions and other public agencies and entities within the state. (Hereafter, such subdivisions, agencies and entities shall be referred to as "public agencies"). Since its enactment, the agreement has been modified approximately 1,212 times. All but five of these modifications involved the adding or deletion of "coverage groups" as specified in section 218 of the Act and in the agreement. Five of the modifications involved changes to the original master agreement. Attached hereto as exhibit A and

incorporated by reference herein is a copy of the original agreement and these five modifications. (Hereafter, this agreement, with its modifications, will be referred to as the "State-Federal Agreement"). Under paragraph F of the State-Federal Agreement, the plaintiff is provided the right to terminate the agreement in its entirety or as to any coverage group under certain conditions.

9. The Board of Administration of the Public Employees' Retirement System of the State of California (hereafter "Board") is an agency of the State of California which is now authorized by state law to act on behalf of the state to administer and maintain in full force the State-Federal Agreement. With respect to Social Security coverage for public employees, the plaintiff State of California, through the Board represents the interests of its employees, and the employees of the public agencies.

10. The plaintiff State of California, as an employer, has more than 100,000 employees subject to Social Security coverage under the State-Federal Agreement. In addition, there are more than 2,000 other public agencies in the plaintiff State of California which collectively employ more than 400,000 employees subject to Social Security coverage under the State-Federal Agreement.

11. Under paragraph (F) of the State-Federal Agreement, the Board, acting on behalf of the plaintiff State of California, submitted notices of voluntary termination of Social Security coverage by certain public agencies which have not yet terminated Social Security coverage. Specifically, 71 of these agencies have given notices of termination effective December 31, 1983; 117 of these agencies have given notices of termination effective December 31, 1984; and 3 of these agencies have given notices of termination effective December 31, 1985. Attached hereto is Exhibit B and incorporated by reference herein is a list of these three categories of agencies. All but one of such notices were accepted by the Social Security Administration. As a result of the passage of

Public Law 98-21, the Social Security Administration has refused to accept the last notice which was submitted on behalf of the Sacramento Municipal Utility District on or about March 25, 1983.

12. Public Law 98-21 to the extent it amends section 218 of the Act, purports to invalidate the notices of termination set forth in paragraph 11 and further purports to prohibit the plaintiff State of California from terminating the State-Federal Agreement in its entirety or as to any coverage group.

13. In employing individuals to perform its governmental functions, the plaintiff State of California acts in its sovereign capacity. The determination of the compensation paid and the disability and retirement benefits of those employees is a sovereign function of the plaintiff State of California. The decision of whether the employees are to receive Social Security coverage as a condition of employment with the plaintiff, is a decision vested solely within its sovereign authority.

14. Adequate compensation, disability and retirement benefits for public employees employed by various public agencies in the plaintiff State of California is a matter of sovereign state interest. In entering the State-Federal Agreement and in maintaining it, the plaintiff has acted in its capacity as sovereign state on behalf of not only its own employees, but the other public employees employed by the public agencies subject to Social Security coverage.

15. Defendant United States of America, amending section 218 of the Act by Public Law 98-21, has significantly altered and displaced the ability of the plaintiff State of California to structure its relationships with its employees who perform sovereign functions of the state of administering the public law and furnishing public services. This amendment has also altered and displaced the employer-employee relationship of the public agencies of the plaintiff State of California which have employees subject to Social Security coverage. In so

amending section 218, defendant United States of America has acted in excess of the powers granted to it by the United States Constitution and has infringed upon powers reserved to the plaintiff State of California under the Tenth Amendment of that Constitution.

16. Additionally, defendant United States of America in amending section 218 of the Act by Public Law 98-21, has attempted to impair its own contractual agreement with plaintiff State of California in excess of any powers granted to it by the United States Constitution and in violation of the Tenth Amendment of that Constitution.

17. Defendants Margaret Heckler and John Svahn have taken measures to enforce section 218 of the Act as most recently amended.

18. The enforcement of section 218 as amended immediately impairs the ability of the plaintiff State of California, as well as the other public agencies to make and implement decisions with respect to compensation, disability and retirement benefits for their respective employees. As to the public agencies listed in Exhibit R, the enforcement of section 218 as amended interferes with each of those agencies' ability to plan for or implement compensation, disability and retirement plans for their employees whose Social Security coverage was intended to be terminated. For the plaintiff State of California and the other public agencies which have not yet filed a notice of termination pursuant to the State-Federal Agreeme section 218 as amended interferes with the immediate ability of each to consider, as an option, filing such a notice in connection with the planning of compensation, disability and retirement benefits for employees. Because of the substantial constitutional question involved and the present and immediate interference with the sovereign functions of the plaintiff State of California and the various public agencies it represents, plaintiff is entitled to an adjudication of its rights and is entitled to an injunction restraining the enforcement, operation and execution of section 218 of the Act, as amended by

Public Law 98-21, on the ground that it is unconstitutional.

19. Plaintiff has no plain, adequate or speedy remedy to redress the injury suffered by defendants' unlawful conduct and, therefore, requests appropriate injunctive relief.

WHEREFORE, plaintiff prays for the following relief:

1. That enforcement, operation and execution of section 218 of the Social Security Act as amended by Public Law 98-21 be held to be void as repugnant to the Constitution of the United States;

2. That the court enter interlocutory, preliminary and permanent injunctions and a decree restraining the defendants from enforcing said act against plaintiff; and

3. For such other and additional relief as the facts alleged herein warrant.

DATED: July 14, 1983

Respectfully submitted

JOHN K. VAN DE KAMP
Attorney General

By /s/ Paul H. Dobson
PAUL H. DOBSON
Deputy Attorney General

Attorneys for Plaintiff

EXHIBIT A

AGREEMENT

THIS AGREEMENT entered into this 9th day of March, 1951, by and between the United States of America, acting by and through Oscar R. Ewing, Federal Security Administrator, by virtue of authority vested in him by Section 218 of the Social Security Act, as amended, party of the first part hereinafter called "Administrator" and the State of California, acting by and through the Director of Finance of the State of California, by virtue of the authority granted him by Chapter 46, California Statutes of 1950, 3rd Extra Session, party of the second part hereinafter called "State";

WITNESSETH:

The parties hereto, pursuant to authority conferred upon them by law, agree to extend, in conformity with Section 218 of the Social Security Act, the insurance system established by Title II of the Social Security Act to all services performed by employees of the State and employees of those political subdivisions of the State listed in the Appendix attached hereto and made a part hereof, according to the following terms and conditions:

(A) Definitions

For purposes of this agreement—

(1) The term "political subdivision" includes an instrumentality of (a) the State, (b) one or more political subdivisions of public agencies of the State, or (c) the State and one or more of its political subdivisions or public agencies.

(2) The term "employee" means an employee as defined in Section 210(k) of the Social Security Act and shall include an officer of the State or of a political subdivision.

(3) The term "retirement system" means a pension, annuity, retirement or similar fund or system established by the State or by a political subdivision thereof.

(B) Services covered.

This agreement includes all services performed by individuals as employees of the State and as employees of those political subdivisions listed in the Appendix attached hereto, other than services expressly excluded therein and except the following:

1. Any service performed by an employee in a position covered by a retirement system on the date the agreement is made applicable to the coverage group in which such employee is included.
2. Service performed by an employee who is employed to relieve him from unemployment.
3. Service performed in a hospital, home or other institution by a patient or an inmate thereof.
4. Covered transportation service (as defined in Section 210(l) of the Social Security Act), and
5. Service (other than agricultural labor or service performed by a student) which is excluded from employment by any provision of Section 210(a) of the Social Security Act, other than paragraph eight (8) of such section.

(C) Contributions by the State.

The State will pay to the Secretary of the Treasury, at such time or times as the Administrator may by regulation prescribe, amounts equivalent to the sum of the taxes which would be imposed by Sections 1400 and 1410 of the Internal Revenue Code if the services of employees covered by this agreement constituted employment as defined in Section 1426 of such code.

(D) Compliance with regulations.

The State will comply with such regulations as the Administrator may prescribe to carry out the purposes of Section 218 of the Social Security Act.

Provided, however, that the political subdivisions covered by this agreement, or any modification hereof, shall be permitted to deal directly with the Bureau of Old Age and Survivors Insurance regarding all matters concerning old age and survivors insurance benefits.

And provided further, that the State shall not (a) be required in any report or return filed by the State for all employees covered by the agreement, or any modification thereof, to list such employees in a continuous or single listing in employee account number, alphabetical or similar order, or (b) be required to supply statistical data by way of job classification breakdown of the employees covered by this agreement, or any modification thereof.

(E) Modification.

This argeement shall be modified at the request of the State to include political subdivisions or coverage groups, or both, in addition to those political subdivisions in the appendix attached hereto, or to include additional services not now included in this agreement, such modification to be consistent with the provisions of Section 218 of the Social Security Act.

(F) Termination by the State.

The State, upon giving at least two years' advance notice in writing to the Administrator, may terminate this agreement, either in its entirety or with respect to any coverage group, effective at the end of a calendar quarter specified in the notice, provided, however, that the agreement may be terminated in its entirety only if it has been in effect not less than five years prior to receipt of such notice, and provided further that the agreement may be terminated with respect to any coverage group only if it has been in effect with respect to such coverage group for not less than five years prior to receipt of such notice.

(G) Termination by the Administrator.

If the Administrator, after reasonable notice and opportunity for hearing to the State, finds that the State has failed or is no longer legally able to comply substantially with any provision of this agreement or of Section 218 of the Social Security Act, he shall notify the State by giving notice in writing to the Director of Finance of the State, at Sacramento, California, that this agreement will be terminated in its entirety, or with respect to any one or more coverage groups, at such time designated in, but not later than two years from the date of such notice, as he deems appropriate, unless prior to such termination date he finds that there no longer is any such failure or that the cause for such legal inability has been removed. If, under this part or part (F), an agreement is terminated with respect to any coverage group, such termination shall be effective also with respect to any additional services in such coverage group included in the agreement pursuant to any modification thereof under part (E).

(H) Failure to make payment when due.

In case the State does not make, at the time or times due, the payments provided for under this agreement, there shall be added, as part of the amounts due, interest at the rate of 6 per centum per annum from the date due until paid, and the Administrator may, in his discretion, deduct such amounts plus interest from any amounts certified to the Secretary of the Treasury for payment to the State under any provision of the Social Security Act. Amounts so deducted shall be deemed to have been paid to the State under such provision of the Social Security Act.

(I) Effective Date.

This Agreement shall be effective as of January 1, 1951.

UNITED STATES OF AMERICA

By /s/ John L. Thurston
Acting (Federal Security
Administrator)

STATE OF CALIFORNIA

By /s/ James S. Dean
JAMES S. DEAN
Director of Finance

MODIFICATION NO. 48
TO CALIFORNIA STATE SOCIAL SECURITY AGREEMENT

The Secretary of Health, Education, and Welfare and the State of California acting through its representative designated to administer its responsibilities under the agreement of March 9, 1951, hereby accept the following amendments to said agreement:

I

The opening paragraph of said agreement is amended by changing the phrase, "The Federal Security Administrator, hereinafter called the Administrator" to read:

> "The Secretary of Health, Education and Welfare, hereinafter called the Secretary";

and Parts (C), (D), (F), (G), and (E) of said agreement are amended by changing the term "Administrator" wherever it appears in such Parts to read:

"Secretary"

II

Paragraph (1) of Part (B) of said agreement (relating to the exclusion of services in positions subject to a retirement system) is amended by changing such paragraphs to read:

> "(1)(a) Any service other than service described in subdivision (b)(2) of this paragraph, performed by an employee in a policeman's or fireman's position which, on the date this agreement is made applicable to the coverage group (as defined in section 218(b)(5) of this Act) to which he belongs, is covered by a retirement system; and
>
> (b) Any service performed by an employee in a position which is not a policeman's or fireman's position and which, on September 1, 1954, is covered by a retirement system other than—
>
> "(1) Service performed by an employee in a position which is included in a separate coverage group established by section 218(d)(4) of the Social Security Act; or
>
> "(2) Prior to January 1, 1958, service performed by an employee as a member of a coverage group (as defined in section 218(b)(5) of the Act) with respect to which this agreement was in effect on September 1, 1954, in a position—
>
> "(A) to which this agreement is not otherwise applicable;
>
> "(B) which was covered by a retirement system on the date the agreement was made applicable to such coverage group, and
>
> "(C) which, by reason of action taken prior to September 1, 1954, by the State or any of its political subdivisions, as the case may be, is not covered by a retirement system on the date the agreement is made effective to such service; or
>
> "(3) Service performed by an individual as a member of a coverage group (as defined in section 218(b)(5) of the Act) with respect to which this agreement is in effect, in a position covered by a retirement system, if the individual performing such service was ineligible to become a member of such retirement system on the date the agreement was made applicable to such coverage group (or, if later, the date on which such individual first occupied such position)."

Part (C) of said agreement (relating to contributions by the State) is amended to read:

> "The State will pay to the Secretary of the Treasury, at such time or times as the Secretary of Health, Education and Welfare may by regulation prescribe, amounts equivalent to the sum of the

taxes which would be imposed under the Federal Insurance Contributions Act if the services of employees covered by this agreement constituted employment as defined in such act."

Part (F) of said agreement is amended by adding at the end thereof the following two new sentences:

"The State may also terminate the applicability of this agreement to services performed by employees referred to in Part (B)(1)(b)(3) of this agreement if it is provided in the modification to the agreement pursuant to which this agreement is made applicable to such services, that the services of such individuals shall cease to be covered by this agreement when they become eligible to be members of the retirement system with respect to which they were ineligible for membership on the date the agreement was made applicable as to such services. The preceding sentence shall not operate to terminate coverage of the services of such individuals, however, if, on the date any such individuals become eligible to be members of such retirement system, this agreement has been otherwise so modified as to extend coverage thereunder to services performed by individuals in a coverage group (as defined in section 218(d)(4) of the Social Security Act) which includes members of such retirement system."

Dated this 16th day of March, 1955.

STATE OF CALIFORNIA

JOHN M. PEIRCE
Director of Finance

By /s/ A. Earl Washburn
A. EARL WASHBURN
Deputy Director of Finance

Dated this 13th day of April, 1955.

SECRETARY OF HEALTH, EDUCATION AND WELFARE

By /s/ Ewell T. Bartlett
EWELL T. BARTLETT
Assistant Director
Bureau of Old-Age and
Survivors Insurance

MODIFICATION NO. 254 TO CALIFORNIA STATE SOCIAL SECURITY AGREEMENT

The Secretary of Health, Education, and Welfare and the State of California, acting through its representative designated to administer its responsibilities under the agreement of March 9, 1951, hereby accept the following amendments to said agreement:

Paragraph (1)(b) of said agreement (Services Covered) is amended to read:

"(1)(b) Any service other than services described in Section 218(d)(8) of the Act performed by an employee in a position which is not a policeman's or fireman's position and which, on September 1, 1954, or, if subsequent to September 1, 1954, the date this agreement is made applicable to the coverage group (as defined in Section 218(b)(5) of the Act) to which he belongs, is covered by a retirement system other than—"

Approved for the State of California this 15th day of December, 1958.

BOARD OF ADMINISTRATION
STATE EMPLOYEES'
RETIREMENT SYSTEM

By /s/ William E. Payne
WILLIAM E. PAYNE
Executive Officer

Approved this 30th day of Dec., 1958.

SECRETARY OF HEALTH, EDUCATION
AND WELFARE

By /s/ Thomas C. Parrott
THOMAS C. PARROTT
Acting Assistant Director
Bureau of Old-Age and
Survivors Insurance

MODIFICATION NO. 300 TO CALIFORNIA STATE SOCIAL SECURITY AGREEMENT

The Secretary of Health, Education, and Welfare and the State of California, acting through its representative designated to administer its responsibilities under the Agreement of March 9, 1951, hereby accept the following amendments to said Agreement:

Paragraph (1)(a) of Part (B) of said Agreement (Services Covered) is amended to read:

"(1)(a) Prior to September 16, 1959, any service other than service described in subparagraph (c)(2) of this paragraph performed by an employee in a policeman or fireman position which, on the date this Agreement is made applicable to the coverage group (as defined in Section 218(b)(5) of the Act) to which he belongs, is covered by a retirement system;

(b) "On and after September 16, 1959, any service other than service described in Section 218(d)(8) of the Act or subparagraphs (c)(1) or (c)(2) of this paragraph performed by an employee in a policeman or fireman position which, on the date this Agreement is made applicable to the coverage group (as defined in Section 218(b)(5) of the Act) to which he belongs, is covered by a retirement system in effect on or after September 16, 1959; and"

The present paragraph (b) of Part B(1) is relettered as paragraph (c).

Approved for the State of California this 11th day of December, 1959.

BOARD OF ADMINISTRATION
STATE EMPLOYEES'
RETIREMENT SYSTEM

By /s/ William E. Payne
WILLIAM E. PAYNE
Executive Officer

Approved this 21 day of December, 1959.

SECRETARY OF HEALTH, EDUCATION
AND WELFARE

By /s/ Louis Zawatzky
LOUIS ZAWATZKY
Acting Assistant Director
Bureau of Old-Age and
Survivors Insurance

MODIFICATION NO. 417 TO CALIFORNIA STATE SOCIAL SECURITY AGREEMENT

The Secretary of Health, Education and Welfare and the State of California acting through its representative designated to administer its responsibilities under the agreement of March 9, 1951, hereby accept the following amendment to said agreement:

Paragraph (1)(c) of Part (B) of the agreement as revised by Modification 48, 254, and 300 is further amended by striking out the period at the end of subparagraph (3) and inserting in lieu thereof "; or" and by inserting after subparagraph (3) the following new subparagraph:

"(4) Service performed by an individual in a position under a retirement system as a member of a coverage group established pursuant to Section 102(k) of P. L. 86-778."

* * * *

Approved for the State of California this 21st day of December, 1961.

BOARD OF ADMINISTRATION
STATE EMPLOYEES'
RETIREMENT SYSTEM

By /s/ William E. Payne
WILLIAM E. PAYNE
Executive Officer

Approved for the Secretary of Health, Education, and Welfare this 27th day of Dec., 1961.

SECRETARY OF HEALTH,
EDUCATION AND WELFARE

By /s/ Thomas C. Parrott
THOMAS C. PARROTT
Assistant Director
Bureau of Old-Age and
Survivors Insurance

MODIFICATION NO. 745 TO CALIFORNIA STATE SOCIAL SECURITY AGREEMENT

The Secretary of Health, Education, and Welfare and the State of California, acting through its representative designated to administer its responsibilities under the agreement of March 9, 1951, hereby accept the following amendment to said agreement:

Part (B) of said agreement (Services Covered) is amended by adding at the end thereof the following new paragraph:

"(6) Effective March 31, 1968, services performed by election officials or election workers for each calendar quarter in which the remuneration paid for such services is less than $50."

Approved for the State of California this 29th day of March 1968.

BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES'
RETIREMENT SYSTEM

By /s/ William E. Payne
WILLIAM E. PAYNE
Executive Officer

Approved this 25th day of April 1968

SECRETARY OF HEALTH,
EDUCATION AND WELFARE

By /s/ Idella Hardy
IDELLA HARDY
Director
Bureau of Retirement and
Survivors Insurance
Social Security
Administration

EXHIBIT B

SCHEDULE OF CALIFORNIA PUBLIC AGENCIES REQUESTING VOLUNTARY TERMINATION OF SOCIAL SECURITY

EFFECTIVE DATE: 12/31/83 (71 agencies)

Padre Dam Municipal Water District
Butte County Housing Authority
Yucca Valley Park & Recreation District
City of South San Francisco
Paradise Recreation & Park District
Community Development Commission of the
County of Mendocino
City of Ontario
City of Vallejo
Marinwood Community Services District
Orland-Artois Water District
Paradise Irrigation District
City of Willits
Tulare Mosquito Abatement District
Strawberry Recreation District
Kaweah Delta Hospital District
Tehachapi Valley Hospital District
County of Del Norte
City of Merced
Home Gardens Sanitary District
County of Fresno
Fresno Irrigation District
Sierra View Hospital District
Rubidoux Community Services District
City of Monte Sereno
San Lorenzo Valley Water District
County of San Diego
Marin Municipal Water District
Coalinga Hospital District
Los Angeles County Law Library
City of Sanger

Solano County Mosquito Abatement District
City of Fort Bragg
Eden Township Hospital District
City of Atwater
City of Folsom
Fresno Metropolitan Flood Control District
City of Ceres
City of Arvin
Mendocino Coast Hospital District
Tahoe Forest Hospital District
City of Calexico
Washington Township Hospital District
County of Celuse
Housing Authority of the County of Stanislaus
City of Gustine City
Meadow Vista County Water District
City of Arcata
City of Winters
Sweetwater Authority
Delano Mosquito Abatement District
Helix Water District
City of Delano
Aromas Tri-County Fire District
Bear Mountain Recreation & Park District
City of Colusa
City of Lincoln
Selma Hospital District
North San Diego County Transit
Development Board
County of Placer
City of Dos Palos
City of Newman
Chino Basin Municipal Water District
City of Coronado
Dana Point Sanitary District
Santa Cruz Port District
City of Bellflower
County of Santa Barbara

Santa Barbara County Flood Control and
Water Conservation District
Laguna County Sanitation District
County of Solano
John C. Fremont Hospital District

EFFECTIVE DATE: 12/31/84 (117 agencies)

Merced County Mosquito Abatement District
Carmel Sanitary District
Town of San Anselmo
Bloss Memorial Hospital District
City of Tracy
Redbud Hospital District
Northern San Diego County Hospital District
Fresno County Waterworks District No. 16
Monte Vista County Water District
Happy Homestead Cemetery District
County of Tulare
City of Shafter
Mark Twain Hospital District
City of Desert Hot Springs
City of Ming
City of Angels
City of Salines
Town of Hillsborough
City of Soledad
Bear Valley Community Services District
City of San Clemente
Tahoe City Public Utility District
City of Lemoore
City of Rio Vista
Burney Fire District
Central California Irrigation District
Shasta Mosquito Abatement District
City of Redondo Beach
Groveland Community Services District
West Kern Water District

Coalinga-Huron Park & Recreation District
City of Escalon
North Bakersfield Recreation & Park District
Bay Shore Sanitary District
San Diego County Water Authority
Salsipuedes Fire Protection District
North Coast County Water District
Pioneers Memorial Hospital District
Big Bear Municipal Water District
Kern Delta Water District
Hi-Desert County Water District
City of Farmersville
County of Riverside
Riverside County Flood Control and
Water Conservation District
McKinleyville Community Services District
Walnut Valley Water District
Rainbow Municipal Water District
Crescent City Harbor District
County of Shasta
San Bernardino County Board of
Law Library Trustees
Mojave Public Utility District
Placer County Water Agency
Rancho Simi Recreation & Park District
City of Susanville
City of Gonzales
Pico Water District
Glenn-Colusa Irrigation District
Housing Authority of the City of Oakland
City of Greenfield
North Tahoe Public Utility District
Pleasant Valley County Water District
Roseland Fire Protection District
Truckee Donner Public Utility District
Placentia Library District
County of Kings
City of Alturas

Santa Barbara County Housing Authority
Yorba Linda District Library
Mendocino City Community Services District
Lompoc Hospital District
Altadena Library District
Goleta Sanitary District
Humboldt Community Services District
North Burbank Public Utility District
Mountain Gate Community Services District
Butte County Mosquito Abatement District
Meiners Oaks Sanitary District
County of Sierra
County of Monterey
County of Inyo
Chico Area Recreation & Park District
Pleasant Hill Recreation & Park District
Donner Summit Public Utility District
Konocti County Water District
County of Tehama
Centerville Community Services District
Montecito Sanitary District
Oroville-Wyandotte Irrigation District
Dublin San Ramon Service District
Goleta Valley Mosquito Abatement District
Branciforte Fire Protection District
Kings River Conservation District
El Dorado Irrigation District
City of Red Bluff
Big Bear City Community Services District
County of Siskiyou
Ramona Municipal Water District
Goleta Water District
Lindmore Irrigation District
Heber Public Utility District
City of Corning
Crescent Fire Protection District
City of Mendota
West Stanislaus Irrigation District

Fallbrook Sanitary District
County of Nevada
Montecito Water District
City of Lake Elsinore
Town of Yreka City
Corning Mosquito Abatement District
Westwood Community Services District
South Bay Hospital District
Northwest Mosquito Abatement District
City of Loma Linda
City of Ridgecrest
City of Brawley
Copperopolis County Fire Protection District

EFFECTIVE DATE: 12/31/85 (3 agencies)

Northern Salinas Valley Mosquito
Abatement District
City of San Marcos
Sacramento Municipal Utility District

JOHN K. VAN DE KAMP, Attorney General
of the State of California
N. EUGENE HILL, Assistant
Attorney General
PAUL H. DOBSON, Deputy
Attorney General
1515 K Street, Suite 511
Sacramento, California 95814
Telephone: (916) 324-5469
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Civil S-83-776 LKK

STATE OF CALIFORNIA, PLAINTIFF

v.

THE UNITED STATES OF AMERICA; MARGARET HECKLER, in her capacity as Secretary of the DEPARTMENT OF HEALTH AND HUMAN SERVICES of the United States of America, and JOHN SVAHN, in his capacity as Undersecretary of the DEPARTMENT OF HEALTH AND HUMAN SERVICES of the United States of America, and in his capacity as Commissioner of the SOCIAL SECURITY ADMINISTRATION of the United States of America, DEFENDANTS

AFFIDAVIT OF CARL J. BLECHINGER, EXECUTIVE OFFICER, BOARD OF ADMINISTRATION, PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF THE STATE OF CALIFORNIA

CARL J. BLECHINGER, being duly sworn, deposes and says:

1. I am the Executive Officer of the Board of Administration of the Public Employees' Retirement System of the California [sic].

2. The Board of Administration of the Public Employees' Retirement System of the State of California (hereinafter "Board") is charged by state law (Cal. Gov. Code, § 22000, et seq.) with administering on behalf of the state, the State-Federal Agreement executed on March 9, 1951, between the State of California and the United States of America pursuant to section 218 of the Social Security Act (42 U.S.C., § 418), and chapter 46 of the Statutes of 1950 (3d ex. sess.) of the State of California. (See Cal. Gov. Code, §§ 22006, 22200.)

3. As Executive Officer of the Board, I have been designated by the Board as California State Social Security Administrator, and as such am the custodian of the records of the State of California with respect to social security coverage under the 1951 State-Federal Agreement.

4. Attached as exhibit A to the complaint filed in this matter, is a true copy of that agreement with five modifications which involve changes to the original master agreement. There have been approximately 1,212 modifications of the agreement which added or deleted particular coverage groups.

5. As of June 30, 1983, the total number of public employees of the State of California covered under social security pursuant to the State-Federal Agreement and subsequent modifications, was 510,789. Out of this total, 103,012 were employees of the State of California. 407,777 were local agency employees. The total public employers with social security coverage in the State of California is 2,505.

During the fiscal year 1982-83, the State of California, pursuant to the State-Federal Agreement and the provisions of 42 United States Code, section 418(f) paid to the federal government a total of $1,320,311,003.63 in social security contributions. These contributions were paid on covered wages of approximately $9.85 billion.

6. Attached as exhibit 1 and incorporated by reference herein, is a true copy of a July 15, 1983 letter from the Regional Commissioner, Region IX, of the Social Security Administration, informing the State of California that the federal termination of social security coverage of the employees of the various entities listed in the enclosure of that letter, would not take place because of the passage of the Social Security Amendments of 1983.

7. Attached as exhibit 2 and incorporated by reference herein, is a true copy of a letter dated April 21, 1983, from the Regional Commissioner, Region IX, of the Social Security Administration, informing the State of California that the requested termination of social security coverage for employees of the Sacramento Municipal Utility District, would not be honored because of the passage of the Social Security Amendments of 1983.

8. Attached as exhibit 3 and incorporated by reference herein, is a true copy of a January 31, 1983 letter from the Regional Commissioner Region IX, of the Social Security Administration, informing the State of California that it had received the December 23, 1982 request to terminate social security coverage for employees of the City of Ridgecrest. This letter is a representative example of letters from the Social Security Administration

acknowledging receipt of notices of termination of social security coverage for a coverage group pursuant to the State-Federal Agreement referred to above. With respect to the various entities listed in the enclosure attached to a July 15, 1983 letter, which is designated exhibit A and attached hereto, the State of California received similar acknowledgments of receipt from the Social Security Administration.

I declare under penalty of perjury that I have read the foregoing affidavit and I know its contents to be true and correct, and that if called to testify I could testify of my own personal knowledge as to the above facts.

Executed on this 14th day of October, 1983, in Sacramento, California.

/s/ Carl J.Blechinger
CARL J. BLECHINGER
Executive Officer
Board of Administration
Public Employees' Retirement
System of the State of
California

Subscribed and sworn to before me
this —— day of October, 1983.

_____

Notary Public In and For the County
of Sacramento, State of California

EXHIBIT 1

[SEAL]

DEPARTMENT OF HEALTH & HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

Refer To: SD9B1

Region IX
100 Van Ness Avenue
San Francisco CA 94102

Jul 15, 1983

Mr. Carl J. Blechinger, Executive Officer
Public Employees' Retirement System
P.O. Box 1953
Sacramento, California 95809

Dear Mr. Blechinger:

The Social Security Act Amendments of 1983 (P.L. 98-21) amended section 218 (g) of the Social Security Act to provide that no coverage agreement may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983, the date of enactment. This amendment prohibiting the termination of Social Security coverage for State and local government employees applies to any agreement in effect on that date. Thus, any agreements which had not already terminated prior to April 20, 1983, may not be terminated.

This letter will serve as your notification that, as a result of P.L. 98-21, the scheduled termination of coverage for employees of the entities listed in the enclosed exhibit will not take place. Should you wish to verify your records with ours, you will find that the entities are listed in the order in which your letter requesting termination of coverage was received by the Social Security Administration. The scheduled date of termina-

tion can be found under the heading "TERM DATE" and the employer identification number under the heading "EIN". The remaining entries were part of our own internal control system, and would not provide any information useful to you. However, if you have any questions about the exhibit or about this letter, please contact Kathy Kirkpatrick of my staff at 415-556-1984.

Sincerely,

/s/ [Illegible]
for PHILIP J. DIBENEDETTO
Regional Commissioner

Enclosure

EXHIBIT 2

[SEAL]

DEPARTMENT OF HEALTH & HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

Refer to: SD9B1

Region IX
100 Van Ness Avenue
San Francisco CA 94102

Apr 21, 1983

Mr. Carl J. Blechinger
Executive Officer
Public Employees' Retirement System
P.O. Box 1953
Sacramento, California 95809

Dear Mr. Blechinger:

This acknowledges receipt of your letter dated March 24, 1983, which requested termination of Social Security coverage for employees of the Sacramento Municipal Utility District, I.D. No. 69-0930976. As you know, the President has now signed the Social Security Act Amendments of 1983 into law. Included in this legislation is a provision which bars all voluntary terminations of coverage under section 218 of the Social Security Act. The 1983 Amendments read as follows:

"Sec. 103. (a) Section 218(g) of the Social Security Act is amended to read as follows:

"(g) No agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after the date of enactment of the Social Security Amendments of 1983."

(b) The amendment made by subsection (a) shall apply to any agreement in effect under section 218 of the Social Security Act on the date of the enactment of this Act, without regard to whether a notice of termination is in effect on such date, and to any agreement or modification thereof which may become effective under such section 218 after that date."

This provision bars any voluntary termination of coverage for employees of the Sacramento Municipal Utility District. We will, however, maintain a record of the State's request for termination.

If we can provide any further information, please contact Kathy Kirkpatrick at 415-556-1984.

Sincerely,

/s/ [Illegible]
for LARRY ENGLUND
Acting Regional Commissioner

EXHIBIT 3

[SEAL]

DEPARTMENT OF HEALTH & HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

Refer to: SD9B1

Region IX
100 Van Ness Avenue
San Francisco CA 94102

Jan 31, 1983

Mr. Carl J. Blechinger
Executive Officer
Public Employees' Retirement System
P.O. Box 1953
Sacramento, California 95809

Dear Mr. Blechinger:

Your reference: Section SS-900
69-0933234

Your request of December 23, 1982, to the Social Security Administration to terminate Social Security coverage for employees of the City of Ridgecrest, ID No. 69-0933234, has been received. Social Security coverage for these employees will terminate on December 31, 1984, unless the State withdraws its request for termination.

As a reminder, the State may withdraw its request for termination any time prior to January 1, 1985, and continue Social Security coverage. Alternatively, once coverage is terminated, the agreement may not again be modified to include this group. In the meantime the State continues to be liable for contributions on wages paid for services rendered by the employees through the termination date.

We are concerned that groups considering termination give thorough study to the subject because of the very substantial losses that employees may suffer in benefit protection. We believe that Social Security provides a comprehensive plan for employees and their families which generally cannot be replaced by any alternative plan.

We want to assist you in every way, therefore, in advising employees of the City of Ridgecrest about the advantages of Social Security coverage. Kathy Kirkpatrick (415-556-1984) of my staff and Peter D'Anna (916-440-3271) of the district office in Sacramento are aware of this pending termination and are available to work with you.

Sincerely,

/s/ [Illegible]
for JANE PRESLEY
Regional Commissioner

I, Isobel V. Morin, am employed by the Social Security Administartion as a Senior Social Insurance Specialist in the Office of Retirement and Survivors Insurance, Division of Coverage, State and Local Branch. My duties involve developing operational policy and procedures regarding the coverage of employees of State and local governments under agreements between the States and the Secretary of Health and Human Services under the provisions of section 218 of the Social Security Act. I can certify from my own personal knowledge that all 50 States, including Maine, Massachusetts, Nevada, and Ohio, have entered into such agreements. Although the original documents are no longer on file in this office, summaries of the coverage contained under these agreements are periodically issued by the regional offices. My personal copies of the summaries for the States in question show that the original agreement with the State of Maine was entered into on December 3, 1951. The original agreement with the State of Massachusetts was entered into on August 13, 1952. The original agreement with the State of Nevada was entered into on November 24, 1953. The original agreement with the State of Ohio was entered into on December 20, 1962. Although the above agreements do not include State employees, they do include employees of one or more political subdivisions of each of these States.

I further certify based on my own personal knowledge that the termination of coverage under the State of Alaska's agreement pertained only to State employees. Employees of a number of political subdivisions of that State continue to be covered under the State's agreement.

/s/ Isobel V. Morin
ISOBEL V. MORIN
Social Insurance Specialist
QRSI, DC, State & Local Branch

/s/ Dianne J. Cheverie
Notary

Commission Expires 7/1/86—Oct. 28, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV S-83-406-LKK

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, *et al.*, PLAINTIFFS

vs.

MARGARET HECKLER, Secretary, Department of Health and Human Services, *et al.*, DEFENDANTS

AFFIDAVIT OF HARRIS G. FACTOR

I, Harris G. Factor, being duly sworn, depose and say as follows:

I am Director of the Office of Regulations, Social Security Administration (SSA), Department of Health and Human Services. The Office of Regulations is responsible for supplying information regarding litigation involving the SSA.

Section 218(a) of the Social Security Act ("the Act") requires the Secretary of Health and Human Services at the request of any state to enter into an agreement with such state for the purpose of extending the insurance system established by title II of the Act to services performed by individuals as employees of such state or its political subdivisions. Section 218(c) of the Act makes such an agreement applicable to any "coverage group" designated by the State. Section 218(e) of the Act requires that an agreement provides that the state periodically will make payments to the Secretary of the Treasury equivalent to the sum of the social security

taxes that the Internal Revenue Code would impose on private sector employers and employees. The states also provide information with respect to the wages paid to their employees, and that information serves as a basis for crediting employees covered by section 218 agreements with social security coverage identical to that provided to similarly paid workers in the private sector.

Until enactment of section 103 of the Social Security Amendments of 1983, Pub. L. 98-21, section 218(g) of the Act had allowed either the Secretary or a state, upon at least 2 years' notice (and under certain conditions), to terminate an agreement, either in its entirety or with respect to any coverage group. A termination by a state was to be effective at the end of a calendar year specified in the notice. Section 103 of Pub. L. 98-21, however, has amended section 218(g) of the Act to preclude any further agreement terminations, whether by the Secretary or a state.

Information with respect to social security coverage and payments under section 218 agreements has been compiled and examined by employees under my supervision. Examination of that information shows as follows:

1) But for enactment of section 103 of Pub. L. 98-21:

a) Agreements with respect to 287 governmental entities would terminate at the end of 1983. These entities employ approximately 104,000 persons, and as a result of their coverage the states will have paid approximately $149 million for 1983. Assuming no significant change in wages for 1984, approximately this amount of revenue would be lost to the social security trust funds in 1984 if these 287 terminations take effect at the end of 1983.

(b) Parallel statistics with respect to the State of California are 71 entities, approximately 33,750 persons, and approximately $33.7 million.

2) Payment of wages to a worker for services performed under a section 218 agreement entitles that worker to be credited on the Secretary's records with earnings. Termination of a section 218 agreement ends a worker's entitlement to this crediting for wages for services subsequently rendered. The Secretary's earnings records affect determination of entitlement to benefits when a claim is filed. If benefits are awarded, these records also affect the amount of benefits payable. Any benefit claimant whose claim is affected by an absence of recorded earnings for a particular time period, who later (within time limits established by section 205(c) of the Act) can show material earnings in the pertinent period, may obtain readjudication of that claim.

(Figures herein are approximate.) According to statistics for 1982, there were 116 million workers covered by title II of the Act. There were 4.4. million title II claims filed, a rate of 3.8 claims per 100 covered workers. There were 3.9 million title II claims awarded, a rate of 3.4 awards per 100 covered workers. Projecting these rates into 1984, and applying them to the workers described in by [sic] the preceding paragraph, *i.e.*, workers whose services would not be covered by a section 218 agreement in 1984 but for section 103 of Pub. L. 98-21, it can be estimated that the Secretary will, with respect to such workers, receive 3,952 claims and make 3,536 awards; with respect solely to such workers covered by the California agreement, there will be an estimated 1,282 claims and 1,147 awards. If the Secretary in adjudicating these claims is enjoined throughout 1984 from considering the amounts earned after 1983 under the section 218 agreements currently applicable to such workers, and if later it is finally judicially determined that these agreements did not terminate at the end of 1983, each claimant who has received an adjudication based in any respect upon a lack of post-1983 earnings

under a section 218 agreement will be entitled to request a readjudication reflecting such earnings.

/s/ Harris G. Factor
HARRIS G. FACTOR
Director
Office of Regulations
Social Security Administration
Department of Health and
Human Services

Subscribed and sworn to before me this 6th day of December, 1983.

/s/ Diannie J. Cheverie
Notary Public

My Commission Expires: 7/1/86

ERNEST F. SCHULZKE
660 J Street, Suite 443
Sacramento, CA 95814
(916) 441-2222
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Case No. CIV S-83-406-LKK

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, (POSSE), *et al.*, PLAINTIFFS

v.

MARGARET HECKLER, Secretary, Department of Health and Human Services, *et al.*, DEFENDANTS

STATE OF CALIFORNIA)
COUNTY OF EUREKA)

AFFIDAVIT OF ALICE HARRIS IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

ALICE HARRIS, being duly sworn, deposes and says:

1. I am Assistant to the City Manager of the City of Arcata, State of California.
2. I have performed my present duties for the past seven years.
3. My duties include the preparation of a budget for the City of Arcata and supervision of expenditures. In the course of my duties I have become intimately

familiar with the fiscal needs and problems of the said city.

4. Since the enactment of Proposition 13, the City of Arcata has experienced a diminishing of financial resources to deal with the infrastructure of the city. That infrastructure includes the building and maintenance of streets and roads.
5. Since the passage of Proposition 13, the city has grown from 12,000 to 14,500 (approximately) inhabitants. This is an increase of roughly 20%. There has been a corresponding increase in need for basic services.
6. During the same period, the number of full time employees of the city has decreased from 85 to 73 persons, a decrease of approximately 14%. There has been no corresponding increase in other types of employees.
7. The decrease in personnel is the direct result of lack of funds. The work which formerly was there, still is there to be done, in greater quantity. Because the City lacks funds the people cannot be hired to perform the necessary services.
8. The lack of funds also resulted in the inability of the City of Arcata to provide for its remaining employees an increase in compensation for the years 1978-1979 and 1981-1982. With the impact of inflation, this relative reduction in take home pay, had a devastating effect on the budgets of city employees.

   It was noted that city employees were covered by both PERS and Social Security, with the financial burden such double coverage implies.

   The employees initiated the discussion which culminated in the decision to terminate their Social Security coverage.

9. Their reason for terminating their Social Security coverage was twofold. First, it was decided that the funds which would no longer be used for Social Security could in part be used to augment their take home pay. Second, the funds could be used to avert further layoffs, which are certain to occur if more money is not made available. It is projected that at least five more employees will be laid off if termination of Social Security is not allowed. That represents nearly seven percent of the remaining work force. The Arcata area is a depressed one with an approximate 15% unemployment rate. Options for reemployment of these laid off individuals are virtually nonexistent in this area.

10. The fiscal crisis in the City of Arcata is making it impossible to perform essential municipal services in many respects. Paramount among these is the building and maintenance of streets and roads. The inability to purchase such materials will force the layoff of additional employees who would be engaged in road maintenance, and is causing a noticeable deterioration in the said streets and roads. Such deterioration is apparent to the residents of the City of Arcata and others who use said facilities.

11. To give the Court additional insight into the nature of the fiscal crisis the City of Arcata faces, I have prepared some documentation which is marked Exhibit A, is attached hereto and is incorporated herein by this reference.

12. I am firmly convinced that unless the requested preliminary injunctive relief is granted, irreparable harm will result in that city services will be further disrupted and/or discontinued, more layoffs will occur and the fiscal crisis will escalate. The said harm will occur before this lawsuit can be resolved, making any judgment of the Court in favor of the City

of Arcata moot, and making any perceived remedy at law clearly inadequate.

I declare under penalty of perjury that I have read the foregoing Affidavit and know its contents to be true and correct.

WHEREFORE, affiant respectfully requests that the Court enter an Order granting the requested Preliminary Injunction.

Dated: December 6, 1983.

/s/ Alice Harris
ALICE HARRIS

Sworn to and subscribed before me, this 6th day of December, 1983.

/s/ Robert D. Cortelyou
Notary Public

EXHIBIT A

CITY OF ARCATA

STREET CONSTRUCTION AND MAINTENANCE

Miles of Streets	Year	Allocation from City General Fund	Monies from State of California	Total	Allocation per mile of City street	Allocation per mile/ present dollars
50.4	75/76	189,807	96,654	286,461	5,683	10,302
51.4	76/77	166,614	99,226	265,840	5,171	8,484
52.4	77/78	218,951	109,536	328,407	6,267	9,393
56	78/79	292,230	118,751	410,981	7,338	10,302
60.5	79/80	265,986	106,505	372,491	6,156	7,272
60.5	80/81	167,198	142,636	309,834	5,121	5,454
61.8	81/82	197,959	156,657	354,616	5,738	5,490
62.6	82/83	110,538	190,168	300,706	4,803	4,803

COMPENSATION

EMPLOYEES—CLASSIFIED SERVICE
PER MONTH/5TH STEP

Year	Lowest Compensation	Median Compensation	Highest Compensation
75/76	820	1,161◦	1,723
76/77	861	1,219	1,809
77/78	928	1,314	1,997
78/79	928	1,314	2,098
79/80	1,026	1,450	2,314
80/81	1,051	1,560	2,494
81/82	1,051	1,560	2,494
82/83	1,051*	1,560*	2,620*
83/84	1,084	1,608	2,698

◦ When this median wage of 75/76 is adjusted by the CPI factor the amount would be $1830/month for 1983/84.

* City assumes payment of employee's share of PERS.

ERNEST F. SCHULZKE
660 J Street, Suite 443
Sacramento, CA 95814
(916) 441-2222

Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Case No. CIV-S-83-406-LKK

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, (POSSE), *et al.*, PLAINTIFFS

v.

MARGARET HECKLER, Secretary, Department of Health and Human Services, *et al.*, DEFENDANTS

[Filed Dec. 14,1983]

STATE OF CALIFORNIA)
COUNTY OF PLACER)

AFFIDAVIT OF RICHARD J. RAMIREZ IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

RICHARD J. RAMIREZ, being duly sworn, deposes and says:

1. I am City Administrator for the City of Lincoln, California.
2. I have performed my present duties for the past 2½ years.

3. My duties include the preparation of a budget for the City of Lincoln, and the supervision of expenditures. In the course of my duties I have become intimately familiar with the fiscal needs and problems of the said city.
4. The City of Lincoln is a General Law City, organized pursuant to the laws of the State of California.
5. Since the enactment of Proposition 13, the City of Lincoln has experienced a diminishing of the financial resources necessary to carry out essential municipal services.
6. In November of 1981 the City of Lincoln commenced a diligent cut-back effort in an attempt to avert the anticipated financial crisis facing many small cities like Lincoln.
7. The financial crisis in the City of Lincoln is the result of an increase in population (a 6.5% growth since April of 1982), combined with dramatic increases in operating costs.
8. One of the costs which has placed an increasing burden on the fiscal resources of the City of Lincoln, is the increasing cost of social security.
9. Despite an increasing population, Lincoln was forced in April 1982, to reduce its regular full-time sworn police officer staffing levels by 25%. It continues to operate at that level. During 1982, there was a significant increase in crime in the City.
10. According to statistical data available to me, assaults in Lincoln increased from 17 in 1981 to 40 in 1982. Larcenies increased from 87 to 103. Arsons from none to one. I am informed and believe that at least part of the increase in the stated crime categories is due to the decrease in law enforcement. These crimes inevitably cause irreparable harm to their victims. I believe such harm could substantially be reduced, if Lincoln could raise law enforcement to 1981 levels.

11. The library of the City has reduced its operating hours from six days per week in November, 1981, to four days per week in November, 1983.

12. Unless ways are formed to make additional savings, or increase revenues, further reductions in services will have to be made.

13. The City of Lincoln entered the Social Security program with the understanding and assurance that if the circumstances suggested it, the City would be able to terminate its social security coverage.

14. Lincoln did file timely notice of termination. The said notice was accepted by both the state and federal administrators. Effective date of withdrawal is December 31, 1983.

15. By withdrawing from Social Security, the City of Lincoln could realize savings in excess of $36,000 annually, while continuing coverage for its employees under the California Public Employees Retirement System (PERS).

16. That saving would enable Lincoln to bring operating levels back to the November, 1981 standard.

17. I am firmly convinced that unless the requested preliminary injunctive relief is granted, irreparable harm will result in that city services will further be disrupted. The said harm will occur before this lawsuit can be resolved, making any judgment of the Court in favor of the City of Lincoln moot, and making any perceived remedy at law clearly inadequate.

I declare under penalty of perjury that I have read the foregoing Affidavit and know its contents to be true and correct.

WHEREFORE, affiant respectfully request that the Court enter an Order granting the requested Preliminary Injunction.

Dated: December 14, 1983.

/s/ Richard J. Ramirez
RICHARD J. RAMIREZ

Sworn to and subscribed before me, this 14th day of December, 1983.

/s/ Teena C. Malm
Notary Public

SUPREME COURT OF THE UNITED STATES

No. 85-521

MARGARET M. HECKLER, Secretary of Health and Human Services, ET AL., APPELLANTS

v.

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.

Appeal from the United States District Court for the Eastern District of California

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The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

December 2, 1985

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No. 85-521

In the Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

STATE OF CALIFORNIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANTS

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Assistant Attorney General

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QUESTION PRESENTED

Whether Section 103(a) of the Social Security Amendments Act of 1983, 42 U.S.C. (Supp. I) 418 (g), effected a "taking" of property within the meaning of the Fifth Amendment by preventing states from withdrawing from the Social Security System.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, plaintiffs in the district court were the Yorba Linda Library District, the North Bakersfield Recreation and Park District, the Delano Mosquito Abatement District, Katherine T. Citizen, William Rasmussen, and Margie Hunt. Defendants in the district court included, in addition to the parties named in the caption, John Svahn. Named as "real parties in interest" were George Deukmejian, Michael Franchetti, the Board of Administration of the Public Employees Retirement System of the State of California, Robert F. Carlson, Bill D. Ellis, Jake Petrofino, Prescott R. Reed, Wilson C. Riles, Jr., Mel Reuben, Jack G. Willard, Brenda Y. Shockley, and Susan Tohbe.

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v.

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UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

STATE OF CALIFORNIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (J.S. App. 1a-35a) is reported at 613 F. Supp. 558.

JURISDICTION

The judgment of the district court (J.S. App. 36a) was entered on May 31, 1985. A notice of appeal (J.S. App. 37a-38a) was filed on June 27, 1985. On August 19, 1985, Justice Rehnquist extended the time

for docketing the appeal through September 25, 1985. The jurisdictional statement was filed on that date; the Court noted probable jurisdiction on December 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. 418(a)(1) reads in relevant part:

> The Secretary of Health and Human Services shall, at the request of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this subchapter to services performed by individuals as employees of such State or any political subdivision thereof. Each such agreement shall contain such provisions, not inconsistent with the provisions of this section, as the State may request.

42 U.S.C. (Supp. I) 418(g) reads:

> No agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983.

42 U.S.C. 1304 reads:

> The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress.

The Fifth Amendment to the Constitution reads, in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

STATEMENT

1. Congress created the Social Security System in 1935 to serve as the Nation's basic social insurance program. Ch. 531, §§ 201 *et seq.*, 49 Stat. 622 *et seq.* The System, which now provides benefits to aged, ill and disabled individuals, is financed through mandatory payments by current employees and their employers (at present, 7.15% of the employee's first $42,000 of wages). See 26 U.S.C. 3101(a) and (b); 42 U.S.C. (Supp. I) 430(c); 50 Fed. Reg. 45558, 45559 (1985).[1] For most employees and employers, participation in the System is mandatory; as of 1983, 115 million workers, or approximately 90% of the American workforce, were covered by the System. H.R. Rep. 98-25, 98th Cong., 1st Sess. Pt. 1, at 13 (1983).[2]

As originally enacted, the Social Security Act, 42 U.S.C. 301 *et seq.*, excluded state and local government employees from participation in Social Security. See 42 U.S.C. 410(a)(7). In 1950, however, Con-

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[1] Benefits received by current retirees are financed not by their past payments, but rather "by current workers paying social security taxes—each working generation pays for the benefits being paid to the previous generation now retired." Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 2d Sess., *WCMP: 97-32, Termination of Social Security Coverage for Employees of State and Local Government and Nonprofit Groups* 4 (Comm. Print 1982). The System thus has a " 'pay-as-you-go' financing structure." *Ibid.*

[2] Employees who were not covered in 1983 included approximately 2.4 million federal workers (who were protected by a separate federal retirement program), more than 3 million employees of state and local governments, and some 1 million employees of nonprofit organizations. H.R. Rep. 98-25, *supra*, at 13. A number of these workers have since been brought withir the System. See note 10, *infra*.

gress amended the Act to permit the states voluntarily to enroll their employees, and those of their political subdivisions, in the System. Social Security Act Amendments of 1950, ch. 809, § 106, 64 Stat. 514, codified at 42 U.S.C. (& Supp. I) 418. Specifically, Section 418 authorized the federal administrator of the System (now the Secretary of Health and Human Services (the Secretary)), "at the request of any State, [to] enter into an agreement with such State for the purpose of extending the [Social Security] insurance system * * * to services performed by individuals as employees of such State or any political subdivision thereof." 42 U.S.C. 418 (a)(1).

Pursuant to these so-called "Section 418 agreements"—which must "contain such provisions, not inconsistent with the provisions of [Section 418] as the State may request" (42 U.S.C. 418(a)(1))—participating states may enroll all, or only specified "coverage groups," of their employees. 42 U.S.C. 418(c). See 42 U.S.C. 418(b)(5); Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 2d Sess., *WMCP: 97-32, Termination of Social Security Coverage for Employees of State and Local Government and Nonprofit Groups* 1 (Comm. Print 1982) [hereinafter cited as H.R. Comm. Print 97-32].[3] The Act thus leaves it to the state to determine which of its employees, and which

[3] Section 418 originally permitted the extension of Social Security coverage only to state employees who were not already protected by a retirement system, while entirely excluding certain types of public employees from the System (64 Stat. 515). The Section has since been amended to permit virtually all state and local government employees to participate in Social Security.

local government employees, will be enrolled in the System; individual employees or coverage groups may not elect on their own to join (or to refuse to join) the System. See H.R. Comm. Print 97-32, at 1, 5.[4]

States that elect to participate in the System are responsible for collecting and periodically paying to the Secretary of the Treasury "amounts equivalent to the sum of the taxes" that would be due if their employees otherwise were covered by the Act (42 U.S.C. (& Supp. I) 418(e)(1)), and the other requirements imposed upon the states generally are the same as those placed on private employers by the Act. See 42 U.S.C. 418(i). The Secretary may impose interest penalties for late payment. 42 U.S.C. 418(j). The statute also makes provision for the assessment of amounts due (42 U.S.C. 418(q)), for the administrative determination of challenges to assessments and claims for refunds (42 U.S.C. 418 (s)), and for judicial review of such determinations (42 U.S.C. 418(t)).

Following the enactment of Section 418, all 50 states executed agreements with the Secretary to obtain Social Security coverage for their own employees or for those of their political subdivisions.[5] And the percentage of state and local government employees enrolled in the System through Section 418 agreements increased dramatically, from 11% in 1951 to

[4] The Act creates an exception to this rule for state employees who already are covered by a retirement system; a majority of such employees must agree to be covered by a Section 418 agreement. 42 U.S.C. 418(d)(3).

[5] Only five states—Alaska, Maine, Massachusetts, Nevada, and Ohio—currently do not have their own employees enrolled in the Social Security System. See H.R. Rep. 98-25, *supra*, at 17.

70% in 1970. H.R. Comm. Print 97-32, at 24. The percentage of such employees covered by Section 418 agreements has remained roughly constant since then (see *ibid.*); as of 1983, some 9.4 million of the approximately 13.2 million state and local government employees in the United States were participants in the Social Security System. H.R. Rep. 98-25, *supra*, at 17.

2. As originally enacted, Section 418 provided that a participating state could elect to terminate its Section 418 agreement, in whole or in part, upon two years' notice to the Secretary. 42 U.S.C. 418(g).[6] During the statute's first two decades of operation, virtually no states or subdivisions chose to withdraw from the System. H.R. Rep. 98-25, *supra*, at 18; H.R. Comm. Print 97-32, at 26.[7] From 1977 on, however, the number of withdrawals increased significantly. Between 1977 and 1981, 96,000 state and local government employees were withdrawn from the System; by 1983, termination notices were pend-

[6] Only the states were given the authority to file notices of withdrawal, although they were permitted to do so on behalf of local governments; Section 418 did not require a participating state to consult with or inform affected employees before making a decision to terminate coverage. See H.R. Comm. Print 97-32, at 5. Some limits on the state's ability to terminate Section 418 agreements were imposed, however: the state could tender a termination notice for a given coverage group only after the Section 418 agreement enrolling that group in the System had been in effect for at least five years. 42 U.S.C. 418(g)(1)(A) and (B). Once a group's coverage had been terminated, that group could not be reenrolled in the System. 42 U.S.C. 418(g)(3).

[7] Indeed, from 1950 through 1966, 23 public entities representing a total of only 319 workers withdrew from the System, which at that point covered well over 5 million state and local government employees. H.R. Comm. Print 97-32, at 25.

ing for 634 state and local entities representing an additional 227,000 employees. H.R. Rep. 98-25, *supra*, at 18. See S. Rep. 98-13, 98th Cong., 1st Sess. 99 (1983).[8]

In that year, Congress determined that the continued and accelerating withdrawal of employees by states and localities was threatening the integrity of the Social Security System and the System's role as the Nation's basic insurance program. It concluded that permitting states and localities to terminate Social Security participation for their employees was inequitable both for the workers who lost coverage and for the employees who continued to pay into the system. H.R. Rep. 98-25, *supra*, at 18-19. And it noted that withdrawals at the current rate would cost the Social Security trust funds $500 million to $1 billion annually. H.R. Comm. Print 97-32, at 13-14; S. Rep. 98-13, *supra*, at 104; S. Rep. 98-23, 98th Cong., 1st Sess. 2, 13 (1983).

As part of the Social Security Amendments Act of 1983 (the 1983 amendment), Pub. L. No. 98-21, 97 Stat. 65 *et seq.*, Congress accordingly amended Section 418(g) to provide that "[n]o agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983."[9] This amendment prevents

[8] Of these, 287 governmental units employing 104,000 persons were scheduled to withdraw from the program at the end of 1983 (J.A. 61).

[9] Prior to this amendment, the Secretary was authorized to terminate a Section 418 agreement upon finding that the state involved was unable to comply with the agreement or with the Act. 42 U.S.C. 418(g)(2). This provision was eliminated by the 1983 amendment. The amendment also permitted coverage groups that previously had withdrawn to rejoin the System. See Pub. L. No. 98-21, § 103(a), 97 Stat. 71.

a state from withdrawing its employees (or those of its political subdivisions) from the Social Security System even if a two-year termination notice had been filed prior to 1983 and was pending at the time that Section 418 was modified.[10]

3. At the time of the 1983 amendment to Section 418(g), appellee State of California—which has had a Section 418 agreement with the Secretary since 1951 (J.A. 29)[11]—had filed termination notices on

[10] Prior to 1983, employees of certain types of nonprofit organizations were excluded from the Social Security System unless the employing organization filed a certificate waiving its exemption from the System. 42 U.S.C. 410(a)(8)(B). Pursuant to such waivers, approximately 80% to 90% of the 5.3 million employees of nonprofit organizations participated in the System. Like state governments, however, nonprofit institutions were permitted to withdraw from the System upon two years' notice, and in 1983 termination notices were pending for 977 such organizations with 322,600 employees. H.R. Rep. 98-25, *supra*, at 15. In 1983, Congress accordingly made coverage for such employees mandatory by including them within the Act's basic definition of "employee." See Pub. L. No. 98-21, § 102(a)(1), 97 Stat. 70. At the same time, Congress provided that new federal employees would be enrolled in the System. § 101, 97 Stat. 67.

[11] After executing its Section 418 agreement with the Secretary, California enacted legislation permitting it to enter into agreements with public agencies that wished to participate in the System; these entities were to contribute their share of contributions to the State, and were to be permitted to withdraw from the System upon two years' notice to the State. Cal. Gov't Code §§ 22000-22603 (West 1980 & Supp. 1985). See J.S. App. 5a-6a. "[I]n effect, the public agencies were permitted to withdraw only if the State could terminate their enrollment, thus ending the State's own liability for the public agencies' participation" (*id.* at 6a).

At the time of the 1983 amendment to the Act, approximately 511,000 state and local government employees in California were covered by the System. The State did not seek to withdraw its own 100,000 employees from the System. J.A. 51.

behalf of approximately 70 of its political subdivisions with some 34,000 employees (J.A. 61). Those employees were to have been withdrawn from the System at the end of the year. The 1983 amendment, however, prevented the notices from taking effect.

In response to this development, these suits were brought in the United States District Court for the Eastern District of California to challenge the validity of amended Section 418(g). The first action was filed by one set of appellees—several public agencies of the State of California, their employees, local taxpayers, and a group called "Public Agencies Opposed to Social Security Entrapment" (POSSE)—who contended, in part, that the 1983 amendment deprived them of their contract rights without according them due process or just compensation. J.S. App. 9a-10a. The second suit was filed by the State of California, which claimed that Section 418(g) infringed the State's contract and violated the Tenth Amendment by impairing the State's ability to structure its relationships with its employees. J.S. App. 10a-11a. Both sets of appellees sought injunctive and declaratory relief.

The district court granted summary judgment to the appellees.[12] Reviewing California's Section 418 agreement with the Secretary, the court found that the "document evidences an agreement between the

[12] The court first ruled that it had jurisdiction, finding that all of the appellees had standing and that the Anti-Injunction Act, 26 U.S.C. 7421(a), was inapplicable. J.S. App. 11a-24a, 26a-28a.

parties signatory thereto, that each promises to do certain things and to assume certain obligations" (J.S. App. 30a). In the court's view, such an agreement is a contract and thus "property" within the meaning of the Fifth Amendment's Taking Clause (*id.* at 20a, 30a-31a). Similarly, the court found that the right to terminate an agreement on two years' notice, which appeared in the original version of Section 418(g) and was echoed in California's Section 418 agreement (see J.S. App. 4a-5a; J.A. 31), "is a contractual right running in favor of the public agencies." *Id.* at 21a.[13] While the court assumed that Congress would have had the authority to divest the State of its right to withdraw "if the right existed solely by virtue of the statute," here the ability to withdraw from the Social Security System "draws its independent existence from the plain terms of the contract."[14] The court therefore held that "Congress is simply not free to deprive the State of its contractual right without just compensation." J.S. App. 32a (footnotes omitted).

Although the district court thus found that the 1983 amendment to Section 418(g) effected a taking

[13] The court acknowledged that only the Secretary and California were parties to the Section 418 agreement (J.S. App. 15a-18a), but found that the public agency appellees were third party beneficiaries of the agreement (*id.* at 21a).

[14] The court also "assumed (without deciding) that such an imposition might pass constitutional muster even though the [Section 418] Agreement permits the State to withdraw from the *contract*. In such a case, the State's *contractual* right to withdraw would appear to be unaffected (thus a Just Compensation claim might be avoided), but the termination right would do the State no good since it would then be under a *statutory* obligation to participate in the Program." J.S. App. 3a-4a (emphasis in original).

of property, it concluded that it was not free to order payment of just compensation or to refer the case to the Claims Court for the award of that relief. The court reasoned that the purpose of the 1983 amendment was to "ensure an adequate financial basis for [the Social Security] system by requiring the states and their public agencies to contribute to the system," so that "requir[ing] the United States to pay just compensation by making the contribution for the public agencies is simply and clearly contrary to the will of Congress." J.S. App. 34a. The court therefore declared the amendment void, and ordered the Secretary to "accept the notifications of withdrawal properly tendered to her." *Id.* at 35a.

SUMMARY OF ARGUMENT

A. In assuming that Section 418 agreements are "contracts" that create vested rights, the district court committed a fundamental error. To be sure, Section 418 and the agreements consummated under its authority describe the conditions that govern state participation in the Social Security System; federal and state administrative officials must comply with those conditions, as they must with all aspects of federal law. But while Section 418 agreements thus have a "contractual aspect," "[u]nlike normal contractual undertakings" they implement a program that "originate[s] in and remain[s] governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." *Bennett* v. *Kentucky Department of Education*, No. 83-1798 (Mar. 19, 1985), slip op. 11, 12. Arrangements of this sort generally are understood not to create vested rights, but rather to " 'declare[] a policy to be pursued until the legislature shall ordain otherwise.' " *National Railroad Pas-*

senger Corp. v. *Atchison, T. & S.F. Ry.*, No. 83-1492 (Mar. 18, 1985), slip op. 14 (citation omitted).

That Congress did not intend to create contractual rights here is confirmed both by the legislative history and by the structure of the Act. Virtually no attention was paid to the termination provision when Section 418 was enacted, evidently because it was assumed that few groups ever would seek to terminate coverage. And Congress, from the time of the creation of the Social Security program, has signalled its intention to retain flexibility in structuring the System by expressly reserving the power "to alter, amend, or repeal any provision of [the Act]." 42 U.S.C. 1304. Congress hardly can have expected legislation containing such a provision to give rise to static property interests.

It is true, of course, that the Section 418 program makes use of written agreements. But Congress provided that the states could join the System through individual agreements in an attempt to permit them to play a continued role in the provision of retirement and disability benefits to state and local government employees; written agreements obviously are necessary to memorialize these arrangements. It would turn this cooperative aim on its head, however—and ultimately would disserve state interests—to conclude that attempts to accommodate the states in federal regulatory programs give rise to contractual relationships that make changes in those programs constitutionally impermissible.

B. 1. Even on its own terms—considering California's agreement to be a contract—the district court's analysis is flawed. The agreement was written to effectuate Section 418, and expressly provides that it extends Social Security protection to state and local

government employees "in conformity with" that provision. Section 418, meanwhile, flatly provides that federal-state agreements may not contain terms that are "inconsistent with the provisions of this section." Because the termination provision of California's Section 418 agreement is now inconsistent with the amended Section 418, that provision is unenforceable.

2. The district court's reasoning also is inconsistent with this Court's repeated holding that "[c]ontractual arrangements remain subject to subsequent legislation by the presiding sovereign * * * unless [the sovereign's right to enact such legislation] 'has been specifically surrendered in terms which admit of no other reasonable interpretation.'" *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 147-148 (1982) (citation omitted). There is absolutely nothing in California's Section 418 agreement that purports to insulate appellees from the effects of legislative changes in the System, or to guarantee that Congress will not enact supervening legislation obviating the agreement altogether by requiring the states to participate in Social Security. And again, Section 1304 confirms that Congress did not intend to abandon its sovereign authority to adjust, through legislation, the Social Security obligations of state and local employers.

Congress thus could have ignored the outstanding agreements and simply enacted legislation permanently bringing into the System those state and local employees who already are covered—as the district court itself evidently recognized. And if Congress retained the authority to take such action, it is absurd to suggest that the 1983 amendment is constitutionally suspect because Congress achieved the same result by modifying existing Section 418 agreements. Indeed,

the Court has squarely rejected the contention that, "in a statute such as this, regulating purely economic matters, * * * Congress' choice of statutory language can invalidate the enactment when its operation and effect are clearly permissible." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 23-24 (1976).

C. If, on the other hand, the district court meant to conclude that Section 418 agreements must be construed in a way that would prevent Congress from making essential modifications in the System, its holding is inconsistent with this Court's oft-stated admonition that sovereign authority "cannot be contracted away." *North American Commercial Co.* v. *United States*, 171 U.S. 110, 137 (1898). See, *e.g.*, *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 23 (1977); *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 108-109 (1938). Applying this principle, the Court repeatedly has rejected challenges to legislative action abrogating contractual obligations that purported to restrict the government's power to legislate for the public welfare. It has scrutinized such action only to ensure that the challenged legislation involved a legitimate exercise of "'the sovereign right of the Government to protect the * * * general welfare of the people.'" *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 241 (1978). In contrast, the Court has recognized that this principle does not affect a sovereign's ability to enter into binding financial or debt contracts.

If Section 418 agreements are contracts that must be construed to foreclose the federal government from mandatorily enrolling participating states in the System, they fall squarely within the category of agreements that create no vested rights because they purport to deny the government the authority to take

action essential for the general welfare. And the 1983 amendment plainly involved a legitimate attempt to legislate for the public good: Congress amply documented its conclusion that the withdrawal of state and local government employers from the System would leave many workers with inadequate pension and insurance protection, while providing a windfall to employees whose Social Security rights have vested.

D. Finally, even granting the district court all of its questionable assumptions—that is, even assuming that Section 418 agreements are binding, enforceable contracts of a conventional sort—the court below nevertheless erred in concluding that the 1983 amendment effected a taking in the constitutional sense. The Court has identified three principal considerations that bear on the question whether governmental action that diminishes property rights amounts to a taking: "'the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.'" *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 17.

Here, nothing in the character of the 1983 amendment suggests a taking; to the contrary, courts should be particularly reluctant to find a taking when the challenged government action involves the impairment of a contract. Because state employers retain the principal benefit that led them to enter into Section 418 agreements—participation in the System—the economic impact of the legislation does not rise to the level of a taking. And it is difficult to discern *any* investment-backed expectations on the part of appellees that are frustrated by the 1983 amendment since, as the district court acknowledged (J.S. App. 3a-4a), Congress at all times reserved its authority to enact new provisions including employees

of state and local governments in the System. In these circumstances, the amendment cannot be said to have violated "the dictates of '"justice and fairness."'" *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979) (citations omitted).

ARGUMENT

THE 1983 AMENDMENT DID NOT EFFECT A TAKING WITHIN THE MEANING OF THE FIFTH AMENDMENT

The district court has invalidated legislation remedying an arrangement that was manifestly "inequitable both for the employees who lose coverage [when states or localities withdraw from the Social Security System] and for the vast majority of the nation's workforce who continue to pay into the system." H.R. Rep. 98-25, 98th Cong., 1st Sess. Pt. 1, at 18-19 (1983). The impact of the court's decision is extraordinary. The holding below will have an immediate effect on the 227,000 state and local government employees whose employers attempted to withdraw from the System as of 1984; if their coverage is terminated, a great many of these employees will be left with inadequate pension and insurance guarantees, while others—whose rights in the System already have vested—will obtain windfall payments. Similarly, the decision potentially may affect the pension rights of more than 9 million other state and local government employees, whose participation in Social Security (under the district court's ruling) may be terminated at any time at the election of their employers. The financial impact on the System of the the district court's decision also is immense: if withdrawals are permitted to continue at their current pace, the Social Security trust funds will lose between $500 million and $1 billion annually (H.R.

Comm. Print 97-32, at 13-14), with an aggregate loss of well over $3 billion for the 1983-1989 period. S. Rep. 98-23, 98th Cong., 1st Sess. 2, 13 (1983).

These difficulties, however, are not the inevitable result of some fatal constitutional flaw in the 1983 amendment that was identified by the district court. To the contrary, that court disregarded a range of considerations that should have been at the center of its assessment of the 1983 amendment's constitutionality. The court failed to consider the purpose of the Section 418 program and the nature of the agreements consummated under the Act. It took no account of Congress's preeminent role in arranging "the burdens and benefits of economic life." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). And the court gave no weight to the congressional judgment that, because Social Security is "the Nation's basic social insurance program" (H.R. Comm. Print 97-32, at 1), "the Nation as a whole should share in the cost of that program." Senate Special Comm. on Aging, 96th Cong., 2d Sess., *State and Local Government Terminations of Social Security Coverage* 76 (Comm. Print 1980) [hereinafter cited as 1980 Sen. Comm. Print].[15]

A. Section 418 Agreements Do Not Create Vested Property Rights That Are Protected By The Fifth Amendment

The district court grounded its holding on the assumption that Section 418 agreements represent run-of-the-mill contractual relationships between the state

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[15] As we explained in our Jurisdictional Statement (at 9-10 n.9), none of the POSSE plaintiffs was properly before the district court. Because the court concededly did have jurisdiction to resolve California's complaint, however, it had the authority to decide the case.

and federal governments, with each side holding vested property rights. The 1983 amendment, the court reasoned, modified and thus impaired the value of the Section 418 agreement at issue in this case, and in that way effected a "taking" of the property represented by the "contract." The district court's basic assumption, however, involves a fundamental misunderstanding of the nature of Section 418, and of the agreements consummated under its authority.

Section 418 and the agreements that implement it establish the conditions that govern current state participation in the System, and describe the ongoing rights and responsibilities of the state and federal governments. Federal administrative officials—and the officials of participating states—plainly must comply with those conditions, as they must with all elements of federal law. See generally *Bennett* v. *New Jersey*, No. 83-2064 (Mar. 19, 1985), slip op. 6; *Bell* v. *New Jersey*, 461 U.S. 773, 790-791 (1983). But while Section 418 agreements have a "contractual aspect" that may not be repudiated by the Secretary, a cooperative federal-state program such as the one established by Section 418 "cannot be viewed in the same manner as a bilateral contract governing a discrete transaction." *Bennett* v. *Kentucky Department of Education*, No. 83-1798 (Mar. 19, 1985), slip op. 11. The agreements have no life or legal significance of their own; they exist only to implement the Act.

Section 418 agreements thus do not involve arms-length negotiation with each side attempting to obtain the benefit of the bargain, or play the role of contracts that may be said to embody "investment-backed expectations." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978). Instead, Congress created the agreement mechanism

simply as a convenient method for "extend[ing] coverage as quickly and with as little difficulty as possible to those [state and local government] employees who needed it most." H.R. Rep. 98-25, *supra*, at 19; see H.R. Comm. Print 97-32, at 5. See generally H.R. Rep. 1300, 81st Cong., 1st Sess. 6 (1949); S. Rep. 1669, 81st Cong., 2d Sess. 6 (1950). In essence, the original version of Section 418 was no different from any statute that establishes a federal program and gives the states an open option to participate.

This is a familiar method of federal regulation; to maintain flexibility and facilitate effective administration, Congress often has invited the states to participate voluntarily in the welfare and disbursement programs that it creates.[16] Such arrangements never have been understood to create enforceable expectations on the part of participants that prevent Congress from making prospective changes in the program. To the contrary, "[u]nlike normal contractual undertakings," programs of this sort "originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." *Kentucky Department of Education*, slip op. 12. Section 418 thus effectuates "a regulatory policy," rather than "a contractual arrangement." *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, No. 83-1492 (Mar. 18, 1985), slip op. 14. And when Congress establishes such a legislative program, "the presumption is that '[it] is not intended

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[16] See, *e.g.*, 7 U.S.C. 2011-2029 (Food Stamp Act of 1977); 20 U.S.C. 2701 *et seq.* (Elementary and Secondary Education Act of 1965); 49 U.S.C. App. 1601a, 1602-1605, 1608, 1610-1612 (Urban Mass Transportation Assistance Act of 1970).

to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Ibid.* (quoting *Dodge* v. *Board of Education*, 302 U.S. 74, 79 (1937)). See *Rector of Christ Church* v. *County of Philadelphia*, 65 U.S. (24 How.) 300, 302 (1861).

That Congress did not intend to create contractual rights here is confirmed both by the legislative history and by the structure of the Act. While Section 418 in its original form offered the states an opportunity to withdraw from the System, "[t]he termination provision receive[d] little attention in the legislative histories of amendments since 1939, presumably because it was assumed that once covered, few groups would seek to terminate coverage." H.R. Comm. Print 97-32, at 3. See generally H.R. Rep. 1300, *supra*, at 6, 10-11; S. Rep. 1669, *supra*, at 6, 10, 13-14; H.R. Conf. Rep. 2771, 81st Cong., 2d Sess. 100 (1950). The congressional emphasis, instead, was on the voluntary nature of the state's *initial* decision to participate in the System. See, *e.g.*, S. Rep. 1669, *supra*, at 10. In contrast, Congress nowhere indicated that it intended to freeze the relationship between the federal government and participating states.

Moreover, "lest there be any doubt in this case about Congress' will" (*National Railroad Passenger Corp.*, slip op. 16), the statute from the outset expressly has reserved to Congress "[t]he right to alter, amend, or repeal any provision of [the Act]." 42 U.S.C. 1304. For over a century, the Court has "recognized the effect of these few simple words" (*National Railroad Passenger Corp.*, slip op. 16 n.22): "through the language of reservation 'Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments * * * as come within the just scope of legislative power.'" *Ibid.* (quoting the *Sinking-Fund Cases*, 99 U.S. 700, 720 (1879)). Congress hardly can have intended legislation containing such a provision to give rise to static property interests.

It is true, of course, that the Section 418 program makes use of written agreements, a consideration that the district court evidently found determinative (see J.S. App. 30a-32a). But there is no talismanic significance to the existence of a separate writing signed by a representative of the federal government. Congress provided that the states could join the Social Security System by means of individual agreements in an attempt to permit them to play a continued role in the provision of retirement and disability benefits to state and local employees; states may enroll certain coverage groups so as to preserve their existing pension systems, and may include in their agreements any provisions that are not inconsistent with the Act. See H.R. Comm. Print 97-32, at 20. Written Section 418 agreements obviously are necessary to memorialize these arrangements.[17] It would turn this cooperative aim on its head, however —and ultimately would disserve state interests—to conclude that attempts to accommodate the states in

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[17] Federal grant programs invariably make use of written plans that describe the terms of state participation. See, *e.g.*, 7 U.S.C. 2020(d) and (e) (Food Stamp program); 42 U.S.C. 1396 and 1396a (Medicaid program). It has never been understood that the states, by filing such plans with the federal government, accept an "offer" to enter into a contract, and in that way foreclose Congress from making prospective changes in the programs involved.

federal regulatory programs give rise to contractual relationships that make changes in those programs impermissible. Cf. *FERC* v. *Mississippi*, 456 U.S. 742, 765 n.29 (1982).

Indeed, viewed in context there can be little doubt that the termination provision in California's Section 418 agreement has no independent legal significance. That provision was not separately negotiated by the State; it simply echoed—and added nothing to—the termination rights granted by the pre-1983 version of Section 418(g). Not surprisingly, then, nothing in the agreement suggests that its termination provision was intended to do more than restate the controlling terms of the statute, or was designed to survive a legislative change in those terms.

In any event, Section 418 agreements have none of the indicia of typical contracts. Their purpose is not a parochial one related to the self-interest of the parties. Nor do the parties venture their property in exchange for a reciprocal undertaking respecting that property. Instead, the agreements make available to individual workers the benefits of participation in a generally applicable social welfare program. The implementation of the agreements is subject to regulations promulgated by the Secretary. 42 U.S.C. 418(i). And the Act makes provision for administrative and judicial review of challenges to assessments and payments (42 U.S.C. 418(s) and (t)) in a manner that parallels those applicable to most federal programs.

In short, the 1983 amendment involved a recasting of the legislation defining the System—that is, of the "statutory provisions expressing the judgment of Congress concerning desirable public policy." This is not a case where the Secretary refused to administer the Section 418 program along the lines mandated by

Congress; instead, Congress used the 1983 amendment to modify the terms on which the Section 418 program will be administered in the future. So long as it had the substantive constitutional authority to enact the 1983 amendment, there was nothing illegitimate in Congress's decision to take prospective action of that sort.

B. Congress Did Not Surrender Its Authority To Make Changes In The Social Security System Through Legislation

Despite the programmatic nature of Section 418, the district court held that Congress may not enact legislation bearing directly on Section 418 agreements, just as a party to a private commercial contract generally may not make unilateral changes to its contractual obligations. In reaching this conclusion, the district court evidently reasoned that Congress, no more than the Secretary or any other administrative official, may change the obligations of participating states in the absence of extra-contractual legislation modifying the System as a whole. As we demonstrated above, this analysis is flawed. But even on its own terms, the district court's reasoning is unpersuasive. On close examination, it becomes clear that the 1983 amendment did not in fact deprive appellees of any rights vested by California's Section 418 agreement: even if the district court was correct in concluding that Section 418 agreements create a contractual relationship between participating states and the Secretary, it hardly follows that the federal government, by entering into such agreements, meant to bind itself never to enroll state employees in the System mandatorily, or never to modify either Section 418 or the System in a manner

that changes the relationship between state employers and the federal government.

1. Even considering this case solely within the confines of the Section 418 agreement, appellees' claims of breach of contract lack merit. The agreement at issue here was, of course, written to effectuate Section 418: the document recites that the Federal Security Administrator (the Secretary's predecessor) entered into the agreement under the authority of Section 418, and declares that the agreement is intended to extend the protections of Social Security to various state employees "in conformity with" Section 418 (J.A. 29). And Section 418(a)(1) itself—which under the agreement's own terms is controlling—flatly provides that federal-state agreements may not contain provisions that are "inconsistent with the provisions of this section." Because the termination provision of California's Section 418 agreement is now inconsistent with the amended Section 418, that provision is unenforceable.

In recognizing that agreements may not contain provisions that are inconsistent with Section 418, the parties to California's agreement plainly intended to preclude "contractual" terms that conflict with amendments to the statute, as well as terms that are inconsistent with the statute as it was enacted in 1950. The agreement nowhere indicates that it will "conform[]" only with pre-existing law. Similarly, the statute does not suggest that it was meant to invalidate only provisions of agreements that are "inconsistent" with the terms of Section 418 as it was originally enacted. And it is impossible to believe that Congress meant to bind itself never to depart from the terms of the Section 418 program as they were established in 1950. Section 418 directs the

Secretary to include in his agreements all provisions proposed by the states that are not inconsistent with the statute (42 U.S.C. 418(a)(1) and (c)(4)); if Congress gave participating states the right either to leave the System or to remain indefinitely on their own terms, while denying itself the opportunity to modify state responsibilities in any way (or, presumably, the right to terminate state participation in the System), it "would have struck a profoundly inequitable bargain." *National Railroad Passenger Corp.*, slip op. 16.[18]

This reading of the agreement is supported as well by venerable principles of contract construction. It is black letter law that contracts must be deemed to incorporate the terms of relevant statutes. See, *e.g.*, *United States* v. *Erika, Inc.*, 456 U.S. 201, 211 n.14 (1982). Indeed, "not only [is] existing law[] read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into [the] contract[] as a postulate of the legal order." *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 435 (1934).

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[18] For example, Section 418 describes the coverage groups that may join the System, as well the special conditions pursuant to which some of them will be admitted (*e.g.*, 42 U.S.C. 418(c), (d) and (u)); it is hardly likely that Congress meant to foreclose itself from ever legislating to exclude certain of these groups from Social Security, or from imposing additional conditions (such as, perhaps, a requirement of referenda among affected employees) prior to the state's decision to terminate coverage. Similarly, it would have been extraordinary had Congress intended to deny itself the opportunity to modify such matters as the terms on which administrative or judicial review will be available (see 42 U.S.C. 418(s) and (t)) or the penalties for late payment (see 42 U.S.C. 418(j)). Cf. *Bell* v. *New Jersey*, 461 U.S. at 777-778 n.3.

Cf. *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 19-20 n.17 (1977). Here, that existing law includes 42 U.S.C. 1304, which, as noted above, expressly reserves Congress's right to alter or amend any provision of the Act. The parties to the agreement accordingly must be deemed to have recognized that Congress was empowered to amend Section 418 —an action that necessarily would affect the validity of the relevant provisions of existing agreements. Because the agreement at issue thus itself acknowledged Congress's authority to modify Section 418, the 1983 amendment disturbed no settled rights.

2. a. The district court's holding also cannot be squared with this Court's usual approach to claims that contracts foreclose the legislature's right to modify its social programs. The Court has explained that "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). It has thus repeatedly held that "[c]ontractual arrangements remain subject to subsequent legislation by the presiding sovereign * * * unless [the sovereign's ability to enact such legislation] 'has been specifically surrendered in terms which admit of no other reasonable interpretation.'" *Jicarilla Apache Tribe*, 455 U.S. at 147-148 (quoting *City of St. Louis* v. *United Rys.*, 210 U.S. 266, 280 (1908)).[19] See, *e.g.*, *United States*

[19] In *Jicarilla Apache Tribe*, for example, the Tribe entered into contractual arrangements with private parties, granting them rights to oil and natural gas in tribal land in exchange for a specified fee. See 455 U.S. at 135; *id.* at 186 (Stevens, J., dissenting). The Tribe subsequently imposed a severance tax on oil and natural gas removed from tribal land. In response to an argument that the tax violated the contractual arrangement by imposing additional requirements not spelled out in the oil and gas leases, the Court held that the Tribe had not contracted away its sovereign right to levy the tax, refusing to find that "the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract" (*id.* at 146); "[t]o presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head." *Id.* at 148.

Trust Co. v. *New Jersey*, 431 U.S. 1, 25 (1977); *New York Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573, 590-593 (1938); *Puget Sound Power & Light Co.* v. *Seattle*, 291 U.S. 619, 627 (1934); *Providence Bank* v. *Billings*, 29 U.S. (4 Pet.) 514, 562 (1830). Cf. *Thorpe* v. *Housing Authority*, 393 U.S. 268, 279 (1969) (a federal agency may impose upon a party with whom it has a contract "an additional obligation not contained in the contract" when "that obligation is imposed under [the agency's] wholly independent rule-making power"); *Horowitz* v. *United States*, 267 U.S. 458, 461 (1925) ("the United States when sued as a contractor cannot be held liable for an obstruction to the performance of a particular contract resulting from its public and general acts as a sovereign"). And this is more than a convenient principle of construction: it serves to avoid the troublesome constitutional and public policy questions posed when "one legislature, by [a] contract with an individual, * * * restrain[s] the power of a subsequent legislature to legislate for the public welfare." *Boyd* v. *Alabama*, 94 U.S. 645, 650 (1876). See *United States Trust*, 431 U.S. at 45 (Brennan, J., dissenting).

Yet there is absolutely nothing in the Section 418 agreement at issue here (or, to our knowledge, in any

other Section 418 agreement) that purports to insulate appellees (or any participating state) from the effects of legislative changes in the Social Security System. The document simply describes the employees who have been enrolled in the System (J.A. 30, 34-35, 38, 39, 41, 42), and lists the rights and obligations of the State *under the agreement* (J.A. 30-32, 35-36). Thus, while it provides that the State "may terminate this agreement" (J.A. 31), the document upon which the district court's opinion rests nowhere guarantees—or even suggests—that Congress will not enact supervening legislation that would obviate the agreement altogether by requiring the states to participate in Social Security. Indeed, nothing in Section 418 itself authorizes the Secretary to enter into agreements that contain such undertakings.[20]

The structure of the Act, moreover, again confirms that Congress did not intend to "nonchalantly shed [the] vitally important governmental power" (*National Railroad Passenger Corp.*, slip op. 17) to modify essential elements of the Social Security System—and that participating states could not reasonably have believed that Congress meant to enter into such a bargain. As noted above, the Act contains an express reservation of congressional authority to modify any

[20] Conversely, neither Section 418 nor any individual agreements contain a provision permitting the United States to terminate the Social Security coverage of state and local government employees. See note 9, *supra*. Yet if Congress were to eliminate the System altogether, it is difficult to imagine that the federal government would be obligated by the existing agreements to continue paying Social Security benefits to those (and only to those) employees. This obviously suggests that the agreements were not intended to address Congress's authority to enact legislation affecting state participants in the System.

of the Act's provisions. And this Court repeatedly has noted that the survival of the System requires

> flexibility and boldness in adjustment to ever-changing conditions * * *. It was doubtless out of an awareness of the need for such flexibility that Congress included in the original Act, and has since retained, a clause expressly reserving to it '[t]he right to alter, amend, or repeal any provision' of the Act. * * * That provision makes express what is implicit in the institutional needs of the program.

Flemming v. *Nestor*, 363 U.S. 603, 610-611 (1960). Cf. *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 174 (1980); *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 575 (1979); *Richardson* v. *Belcher*, 404 U.S. 78, 80-81 (1971). It is hardly likely, then, that Congress would have "abandoned its sovereign powers" (*Jicarilla Apache Tribe*, 455 U.S. at 146) to adjust, through legislation, the Social Security obligations of state and local employers.

b. Against this background, it is beyond dispute that "the United States possesses general regulatory power over appellee outside the contractual relationship." *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 98 (1958) (Harlan, J., dissenting). In exercising this power—as the district court itself evidently recognized (J.S. App. 3a-4a)—Congress could have ignored the outstanding agreements and simply enacted new legislation permanently bringing into the Social Security System those state and local government employees who already are covered.[21] And if Congress re-

[21] Indeed, Congress took just this approach in extending mandatory coverage to *all* employees of nonprofit organizations, whether or not those organizations previously had

tained the authority to take such action, it seems absurd to suggest that the 1983 amendment is constitutionally suspect because Congress achieved the same result by modifying Section 418.

The Court has applied precisely this reasoning in rejecting other formalistic challenges to federal welfare legislation. In *Turner Elkhorn Mining*, for example, the statute at issue provided that coal miners

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participated in the System voluntarily. See note 10, *supra*. In modifying Section 418(g), Congress attempted to accommodate the states by using the somewhat more limited approach of making participation in the System mandatory only for state and local government workers who already are covered. We note that Congress plainly acted rationally in distinguishing between state and local government employees who currently are participants in the System and those who are not. Expanding coverage to workers outside of Social Security would mean displacing existing pension systems (H.R. Comm. Print 97-32, at 18), and would impose double burdens on states or localities that currently operate "pay-as-you-go" pension plans. S. Rep. 98-13, 98th Cong., 1st Sess. 100 (1983). Similarly, persons brought into the System by the states voluntarily were, as a general matter, the ones most in need of Social Security coverage. See H.R. Rep. 98-25, *supra*, at 19; H.R. Comm. Print 97-32, at 5. And the rights of employees currently making Social Security payments may have vested; permitting them to withdraw may entitle them to benefits even though they no longer are paying a portion of their wages into the System. H.R. Rep. 98-25, *supra*, at 19; pages 40-41, *infra*. Congress thus has a compelling interest in preventing movement in and out of the System. See *RoAne* v. *Mathews*, 476 F. Supp. 1089, 1100 (N.D. Cal. 1977), aff'd, 604 F.2d 37 (9th Cir. 1979). See generally *The Darlington*, 358 U.S. at 91 (citation omitted) ("'[f]ederal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution'"); *Heckler* v. *Mathews*, 465 U.S. 728, 748 (1984); *Califano* v. *Webster*, 430 U.S. 313, 321 (1977); *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 6 (1970).

afflicted with complicated pneumoconiosis were "irrebuttably presumed" to be totally disabled, and therefore entitled to be compensated by their employers. 428 U.S. at 10-11. The employers challenged the constitutionality of this provision, asserting that its use of an irrebuttable presumption violated their due process rights. *Id.* at 23. The Court, however, noted that Congress could have awarded compensation to afflicted miners simply because their health had been impaired, whether or not they were in fact totally disabled. In these circumstances, the Court explained, "the argument is essentially that Congress has accomplished its result in an impermissible manner * * *. But in a statute such as this, regulating purely economic matters, we do not think that Congress' choice of statutory language can invalidate the enactment when its operation and effect are clearly permissible." *Id.* at 23-24.

Here, as the district court seemingly acknowledged (J.S. App. 3a-4a), the purpose and effect of the 1983 amendment—guaranteeing permanent Social Security coverage for state and local government employees who already are participants in the System—was a self-evidently permissible one. See note 21, *supra*. And the legislative history indicates that Congress believed that it was, "[a]s an operational matter" (*Turner Elkhorn Mining*, 428 U.S. at 22), exercising its regulatory authority to modify the Social Security System when it amended Section 418(g). Congress made no reference to the abrogation of contractual rights; instead, it declared flatly that it was "prohibit[ing] State and local governments from terminating [Social Security] coverage for their employees." H.R. Rep. 98-25, *supra*, at 19; S. Rep. 98-23, *supra*, at 5. See S. Rep. 98-13, 98th Cong., 1st Sess. 99-100

(1983). That Congress found it most efficacious to take this step by making existing agreements nonterminable, rather than by, in terms, expanding the mandatory coverage of the System, cannot have independent constitutional significance: " 'The Constitution is "intended to preserve practical and substantial rights, not to maintain theories." ' " *City of El Paso* v. *Simmons*, 379 U.S. 497, 515 (1965) (citations omitted).[22]

C. Congress Could Not Surrender Its Sovereign Authority To Modify The Social Security System

The district court concluded that its inquiry was at an end once it determined that Section 418 agreements are contracts. That conclusion, as the discussion above explains, disregarded this Court's views on the propriety of substituting semanticism for constitutional analysis. If the court below meant to hold that Section 418 agreements must be construed in a way that would prevent Congress from making essential modifications in the Social Security System, however, its decision is flawed for another reason: such a holding cannot be reconciled with this Court's repeated admonition that federal and state "governmental powers cannot be contracted away." *North American Commercial Co.* v. *United States*, 171 U.S. 110, 137 (1898).

1. From the earliest days of the Republic, the Court has made it plain that the property clauses of the Constitution—the Taking, Due Process, and Con-

[22] While Congress presumably could cure the semantic defect identified by the district court through the enactment of a new statute making state participation in the System mandatory, in the interim several hundred thousand state and local government employees would have lost their Social Security coverage.

tract Clauses—do not require the federal or state governments "to adhere to * * * contract[s] that surrender[] an essential attribute of [their] sovereignty." *United States Trust*, 431 U.S. at 23. See *id.* at 46-49 (Brennan, J., dissenting).[23] Thus, "the exercise of the police power cannot be limited by contract for reasons of public policy * * * and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the State * * * to abrogate this power so necessary to the public safety." *Northern P. Ry.* v. *Minnesota ex rel. Duluth*, 208 U.S. 583, 598 (1908). See *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 108-109 (1938). This principle serves a compelling purpose:

> One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent. Crucial to this end is the assurance that new legislators will not automatically be bound by the policies and undertakings of earlier days.

United States Trust, 431 U.S. at 45 (Brennan, J., dissenting).

Against this background, the Court repeatedly has rejected challenges to legislative action impairing or abrogating contractual obligations that purported to restrict the government's right to legislate for the public welfare. See, *e.g.*, *Simmons*, 379 U.S. at 508; *Pierce Oil Corp.* v. *City of Hope*, 248 U.S. 498, 501

[23] The Court offered an example of the application of this doctrine in *United States Trust*: "a revenue bond might be secured by the State's promise to continue operating the facility in question; yet such a promise surely could not validly be construed to bind the State never to close the facility for health or safety reasons." 431 U.S. at 25. See *id.* at 23 n.20.

(1919); *Northern P. Ry.*, 208 U.S. at 597; *New Orleans Gas Light Co.* v. *Drainage Comm'n*, 197 U.S. 453, 460 (1905); *Chicago B. & Q. R.R.* v. *Nebraska ex rel. Omaha*, 170 U.S. 57, 72 (1898); *Butchers' Union Co.* v. *Crescent City Corp.*, 111 U.S. 746, 751 (1884); *Stone* v. *Mississippi*, 101 U.S. 814, 817 (1880); *Beer Co.* v. *Missachusetts*, 97 U.S. 25, 33 (1877). See *United States Trust*, 431 U.S. at 23 n.20. Cf. *Horowitz*, 267 U.S. at 461; *Pennsylvania Hospital* v. *City of Philadelphia*, 245 U.S. 20, 23-24 (1917); *Goszler* v. *Georgetown*, 19 U.S. (6 Wheat.) 593, 597-598 (1821).[24] The Court has scrutinized such action

[24] Many of these cases involved challenges to state legislation brought under the Contract Clause, which does not apply to the federal government. See *Pension Benefit Guarantee Corp.* v. *R.A. Gray & Co.*, No. 43-245 (June 18, 1984), slip op. 14 n.8. But these decisions have force outside the Contract Clause context; the Court has made it clear that legislation enacted for the general welfare that impairs a state's contractual obligations should not be deemed to violate any "property rights protected by the Federal Constitution." *Northern P. Ry.*, 208 U.S. at 597. In any event, the Court repeatedly has suggested that the Contract Clause imposes more rigorous restrictions upon the states than the Fifth Amendment imposes on the federal government (*Gray*, slip op. 15; *National Railroad Passenger Corp.*, slip op. 21 n.25). It follows *a fortiori* that, if the Contract Clause does not require the states to adhere to contracts that surrender essential attributes of their sovereignty, the Fifth Amendment does not impose such an obligation on the United States. See notes 31, 32, *infra* (addressing the relationship between the Fifth Amendment's Taking and Due Process Clauses).

It should be added that a government's right to exercise its eminent domain powers to take a contract that is frustrating its current policies (see *United States Trust*, 431 U.S. at 19 n.16) does not suffice to preserve the government's sovereign prerogatives. As a practical matter, the substantial value of many contracts may effectively foreclose the use of eminent do-

only to ensure that the challenged legislation involved a legitimate exercise of " 'the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people' " (*Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 241 (1978) (citation omitted)), rather than the bald "repudiation" of a contractual obligation. *Lynch* v. *United States*, 292 U.S. 571, 580 (1934). Cf. *id.* at 579 (legislation abrogating the government's contractual obligations is not inconsistent with the Fifth Amendment when "the action taken falls within the federal police power or some other paramount power"); *Simmons*, 379 U.S. at 509 (Contract Clause prevents states from adopting the repudiation of debts as a policy).[25]

main—a circumstance that would permit one legislature to establish policy that cannot realistically be modified in the future if subsequent legislatures must regulate by purchasing outstanding contracts. Cf. *id.* at 29 n.27. And none of the Court's decisions in this area suggests that persons challenging legislation that impairs state contracts may have a valid taking claim. Compare *Simmons*, 379 U.S. at 516-517, with *id.* at 533-534 (Black, J., dissenting). Cf. *Pennsylvania Hospital*, 245 U.S. at 22-23. In any event, because the Court has reasoned that contracts purporting to bind a state not to exercise its police powers are m[illegible] subject to an implied condition that the contracts may be frustrated (see *Brand*, 303 U.S. at 108-109), such contracts do not create property to be taken—a conclusion that seems to follow from this Court's oft-stated view that the power to exercise eminent domain cannot be contracted away. See *Pennsylvania Hospital*, 245 U.S. at 22-23.

[25] This principle only comes into play, of course, when *legislative* actions modifying contractual obligations are challenged. It obviously does not give executive officials license to repudiate authorized contractual undertakings.

On the other hand, the Court has recognized that this principle does not affect a sovereign's authority to enter into binding financial or "debt contracts." *United States Trust*, 431 U.S. at 24. See *id.* at 24-25 n.22 (citing cases). See generally *United States* v. *Standard Rice Co.*, 323 U.S. 106, 111 (1944). The Court has explained that such agreements—which establish the government's "contractual obligations when it enters financial or other markets" (*Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 412-413 n.14 (1983))—do not involve "a compromise of the State's reserved powers." *United States Trust*, 431 U.S. at 25.[26] The Court accordingly has treated contracts of this sort as binding ones that create property protected by the Fifth Amendment. *Lynch*, 292 U.S. at 579.[27]

The cases in which the Court has invalidated congressional legislation that abrogated contracts to which the federal government was a party fall squarely within this second category. In *Lynch*, for example, the

[26] " 'The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons.' " *United States Trust*, 431 U.S. at 25 n.23 (citation omitted).

[27] In the Contract Clause context, the Court has explained that even commercial contracts may be impaired if the state action "is reasonable and necessary to serve an important public purpose." *United States Trust*, 431 U.S. at 25. Because the "State's self-interest is at stake" (*id.* at 26) when contracts of this sort are repudiated, however, the Court has declined to defer absolutely to the government's assessment that abrogation is in the public interest. See *National Railroad Passenger Corp.*, slip op. 20 n.24; *Energy Reserves Group*, 459 U.S. at 412-413 n.14.

Court invoked the Taking and Due Process Clauses in striking down legislation that effectively repudiated the government's obligation to pay claims on its war risk insurance policies. 292 U.S. at 579. While these policies were not issued for profit (*id.* at 576), they plainly were quasi-commercial undertakings that in no way restricted the power of Congress to legislate for the general welfare. Indeed, the Court explained that there was no suggestion in *Lynch* that Congress "abrogate[d] these contracts in the exercise of the police or any other power." *Id.* at 580. Instead, the Court concluded that the legislation had been motivated by a simple intent to maintain the government's credit by reducing its obligations, and held that "[p]unctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors." *Ibid.* In reaching this conclusion, the Court took pains to note that federal contracts *may* be abrogated when "the action taken falls within the federal police power or some other paramount power." *Id.* at 579 (footnote omitted). As the Court has subsequently explained, *Lynch* thus stands only for the proposition that "need for money is no excuse for repudiating contractual obligations." *United States Trust*, 431 U.S. at 26 n.25. See *National Railroad Passenger Corp.*, slip op. 20 n.24 (characterizing *Lynch* as subjecting the contractual abrogation to special scrutiny because it involved an attempt to "maintain the credit of public debtors").[28]

[28] *Perry* v. *United States*, 294 U.S. 330 (1935), one of the *Gold Clause Cases*, was decided on even narrower grounds. That case involved a challenge to legislation authorizing the redemption of United States gold bonds in legal tender currency rather than in gold dollars. See *id.* at 347. The Court held that the legislation could not be squared with Art. I, § 8,

2. If Section 418 agreements are contracts that must be construed to foreclose the federal government from mandatorily enrolling participating states in the System, they plainly fall within the first category of contracts outlined above—those that create no vested rights because they purport to deny the government the authority to take action essential to the general welfare. Section 418 agreements are not "purely financial" arrangements like revenue bonds (*United States Trust*, 431 U.S. at 25). Instead, they are the mechanism that Congress used to provide welfare and insurance protection to millions of workers. If the agreements disable Congress from legislating in this area, and thus from protecting a large portion of the workforce against "the risks and uncertainties of advanced industrial society" (H.R. Comm. Print 97-32, at 7), they plainly surrender—impermissibly—an essential attribute of federal sovereignty.

The remaining question is whether the 1983 amendment involved a bona fide attempt to legislate for the general welfare. That issue is easily resolved: even a glance at the legislative history demonstrates that the purposes of the 1983 amendment transcended the sort of repudiation of commercial obligations that was at issue in *Lynch*. Ten years ago, Congress already was expressing concern that the withdrawal of

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Cl. 2 of the Constitution, which authorizes Congress to "borrow money on the credit of the United States"; if Congress could repudiate its bond obligations, the Court held, "the credit of the United States [would be] an illusory pledge" (294 U.S. at 350). See also *id.* at 353-354 (citing Amend. 14 § 4 ("The validity of the public debt of the United States * * * shall not be questioned")). The holding in *Perry* therefore cannot be applied outside its specific context. See generally 294 U.S. at 361 (Stone, J., concurring); *United States Trust*, 431 U.S. at 26 n.25.

local government employees from the System would "reduce the employees' overall benefit protection and lead to increased dependency on others in the future." Senate Special Comm. on Aging, 94th Cong., 2d Sess., *Termination of Social Security Coverage: The Impact on State and Local Government Employees* 2 (Comm. Print 1976) [hereinafter cited as 1976 Sen. Comm. Print]. Since then, Congress has noted repeated suggestions that participation in the System be made mandatory for employees already covered by Section 418 agreements. 1976 Sen. Comm. Print 32; 1980 Sen. Comm. Print 78. In finally making that change, Congress enacted into law a recommendation of the bipartisan National Commission on Social Security Reform. See S. Rep. 98-13, *supra*, at 88-89, 104.

The 1983 amendment was designed to protect the interests of state and local government employees while preserving public confidence in the System as a whole. Congress noted that local government employers were withdrawing from the System "in significant numbers * * * for reasons that appear to have more to do with reducing operating costs than providing basic, adequate protection for all employees." H.R. Rep. 98-25, *supra*, at 19. See H.R. Comm. Print 97-32, at 12-13, 15, 16; 1980 Sen. Comm. Print 17. Local retirement and insurance systems created to replace Social Security could not, in the congressional judgment, duplicate the features of Social Security that Congress deemed essential: the System covers virtually all risks, and provides a cushion for periods of unemployment or employment at low wages. See H.R. Comm. Print 97-32, at 12; 1980 Sen. Comm. Print 24-25, 72-73, 81. This circumstance created particular difficulties for employees

whose coverage had not vested at the time of termination, or who change jobs frequently. Because only Social Security offers retirement protection that is fully "portable" from job to job, such employees might never obtain Social Security benefits, despite having made payments into the System, and would likely be left with inadequate pension and insurance guarantees. See H.R. Rep. 98-25, *supra*, at 19; S. Rep. 98-13, *supra*, at 99; H.R. Comm. Print 97-32, at 12-13; 1980 Sen. Comm. Print 46; 1976 Sen. Comm. Print 24.[29]

Conversely, Congress found that termination of coverage provided a windfall to employees whose Social Security rights already had vested: they remained eligible for substantial benefits although they no longer made payments into the System. H.R. Rep. 98-25, *supra*, at 19; S. Rep. 98-13, *supra*, at 99; H.R. Comm. Print 97-32, at 6, 9-10, 15; 1980 Sen. Comm. Print 74.[30] This plainly inequitable situation led

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[29] Congress explained that "[t]he employer may view the worker who leaves after a relatively short time as a marginal employee for whom he has little interest in providing attractive pension benefits. Consistent with this view, most State government retirement systems are designed to best serve long-term employees. Yet from the point of view of social policy, the employee who moves from job to job needs basic social insurance protection as much as a worker who stays at one job his entire career. The interests of the employer who wishes to retain career employees with a good benefit package may not be consistent with overall social policy, or with the interests of all his employees, both present and future." H.R. Rep. 98-25, *supra*, at 19.

[30] Employees who participate in the System for a set period obtain a lifetime entitlement to retirement and medical benefits (although entitlement to disability benefits terminates five years after the employee withdraws from the System). See

to considerable resentment on the part of workers whose participation in the System was mandatory, and who found themselves inheriting the tax burden surrendered by employees whose rights in the System had vested. H.R. Rep. 98-25, *supra*, at 19; H.R. Comm. Print 97-32, at 14. And it bolstered Congress's conclusion that the "voluntary coverage provision can be seen as an anomaly in the context of a basically mandatory system." H.R. Rep. 98-25, *supra*, at 19. See generally S. Rep. 98-13, *supra*, at 90-91; H.R. Comm. Print 97-32, at 4-5. Congress's attempt to remedy that anomaly in the Nation's basic insurance system plainly involved a legitimate exercise of "the federal police power or some other paramount power." *Lynch*, 292 U.S. at 579. See generally *United States* v. *Lee*, 455 U.S. 252, 258-259 (1982).

1980 Sen. Comm. Print 4-5. While retirement benefits are pegged to an average of career earnings in the System, the formula "is unable to distinguish between an individual with a short period of high earnings, and an individual with a long period of low earnings." S. Rep. 98-13, *supra*, at 102. The System thus treats an employee who participated in Social Security for only part of his career as though he had participated in the System for a lifetime at low wages. And because the Social Security benefit formula is weighted towards persons with low incomes, an employee who is enrolled in Social Security for only part of his career obtains an advantage: the Social Security benefit he receives replaces a relatively high percentage of his covered earnings, while he pays no Social Security tax at all on his uncovered earnings. See *id.* at 102-103. Moreover, Medicare and spousal benefits are not wage-related, and therefore are fully vested once an employee has been covered for the minimum period. H.R. Comm. Print 97-32, at 9-10.

D. Even If Section 418 Agreements Are Property, The 1983 Amendment Did Not Effect A Taking Within The Meaning Of The Fifth Amendment

The preceding sections of this brief demonstrate that the district court erred in concluding that Section 418 agreements are property that was taken by Congress when it enacted the 1983 amendment. But even granting the district court that point—that is, even if Section 418 agreements are enforceable contracts of a conventional sort—the court below nevertheless erred by disregarding this Court's decisions on the validity of laws that affect pre-existing contractual obligations. Such contracts may well be property that is entitled to constitutional protection. The district court failed to recognize, however, that not all "impairment[s]" of contracts are "of constitutional dimension." *National Railroad Passenger Corp.*, slip op. 20. The impairment here (if one exists) plainly is not.

The Court has indicated that contracts are property within the meaning of the Taking Clause of the Fifth Amendment. See *United States Trust*, 431 U.S. at 19 n.16; *Thorpe* v. *Housing Authority*, 393 U.S. 268, 278 n.31 (1969); *Lynch*, 292 U.S. at 579. Cf. *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 12-15. But as the Court repeatedly has noted, "government regulation—by definition—involves the adjustment of rights for the public good." *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979). Thus, at least "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66. See *Penn Central*, 438 U.S. at 124, 130, 136-138. While the Court has set no fixed formula to determine when regulation crosses the permissible line and effects a taking, it has identified three principal considerations that bear on the question: " 'the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.' " *Monsanto*, slip op. 17 (quoting *PruneYard Shopping Center* v. *Robbins*, 447 U.S. 74, 83 (1980)). See *Penn Central*, 438 U.S. at 124.

Here, nothing in the character of the legislation suggests a taking. To the contrary, there are special reasons for courts to be particularly concerned about finding a taking where the property affected by the challenged government action is a contract.[31] Contracts allocate future rights and responsibilities between private—or, as here, public—entities. Subjecting legislation affecting such rights to excessive scrutiny might "effectively compel the government to regulate by *purchase*" (*Allard*, 444 U.S. at 65 (emphasis in original)), and thus preclude Congress from playing its role of "adjusting the benefits and burdens of economic life." *Penn Central*, 438 U.S. at 124. And it would permit persons to "remove their transactions from the reach of dominant constitutional power by making contracts about them." *Norman* v. *Baltimore & O. R.R.*, 294 U.S. 240, 308 (1935). See *Legal Tender Cases*, 79 U.S. (12 Wall.)

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[31] The Court has made it plain that a physical invasion is the paradigm of a taking. See, *e.g.*, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-427 (1982). Indeed, to our knowledge, the Court has never held that federal legislation effected a taking of a contract right. Although the Court in *Lynch* identified the contracts at issue as property within the meaning of the Taking Clause, it evidently found the challenged legislation improper under the Due Process Clause. 292 U.S. at 579. We note that a taking claim in the contract context currently is before the Court in *Connolly* v. *Pension Benefit Guaranty Corp.*, No. 84-1555.

457, 549-552 (1870). Cf. *United States* v. *Security Industrial Bank*, 459 U.S. 70, 75 (1982).[32]

At the same time, the economic effect of the challenged legislation is not so great as to amount to a taking. Cf. *Thorpe*, 393 U.S. at 278-280 & n.35. State employers retain the principal benefit that led them to enter into Section 418 agreements—participation in the Social Security System. Nothing in the 1983 amendment changed the nature of the ongoing relationship between employers and the federal government. And while termination no longer is possible, it is far from clear that the ability to withdraw from the System was, at any point, a significant part of the attraction of the Section 418 program. To the contrary, as we explain above (at 20), the termination provision received little attention when the Section 418 program was created, presumably because it was assumed that few groups would seek to terminate coverage. Indeed, in the program's first 13 years only four local government entities, representing a total of 48 employees, withdrew from the System (H.R. Comm. Print 97-32, at 26); only one state (Alaska) ever has withdrawn its own employees from the System (see *id.* at 1); and the states have made no attempt to withdraw the vast bulk of covered local government employees.[33]

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[32] The Court has pointed to similar considerations in cases involving due process challenges to federal legislation that impaired pre-existing contracts, requiring the party asserting unconstitutionality to demonstrate " 'that the legislature has acted in an arbitrary and irrational way.' " *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, No. 83-245 (June 18, 1984), slip op. 10 (quoting *Turner Elkhorn Mining*, 428 U.S. at 15). See *National Rail Passenger Corp.*, slip op. 21, 25.

[33] While participation in Social Security may impose added expense on state and local government employers, that circumstance in itself plainly does not amount to a taking. See *Penn Central*, 438 U.S. at 131. Cf. *Allard*, 444 U.S. at 65-66; *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915). That is particularly true of legislation, like the 1983 amendment, that is designed to equalize the benefits and burdens of " '"doing business in a civilized community" ' " (*Monsanto*, slip op. 18 (citations omitted)), and that may, as a result, be expected to confer "an average reciprocity of advantage." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). See *Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting).

Finally, the 1983 amendment did not work an impermissible interference with "reasonable investment-backed expectations." It is difficult to discern *any* investment on the part of appellees that is frustrated by the elimination of Section 418's termination provision. And given the power retained by Congress to enact changes in the System as a whole (see pages 26-29, *supra*), any expectation on the part of appellees that they would never be required to participate in Social Security against their will cannot be deemed reasonable. See *Monsanto*, slip op. 17; *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161 (1980). In these circumstances, the amendment to Section 418(g) cannot be said to violate "the dictates of ' "justice and fairness." ' " *Allard*, 444 U.S. at 65 (citations omitted).

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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No. 85-521

In The
Supreme Court of the United States
October Term, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Appellants,

v.

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.,
Appellees.

UNITED STATES OF AMERICA, ET AL.,
Appellants,

v.

STATE OF CALIFORNIA,
Appellee.

On Appeal From The United States District Court
For the Eastern District of California

BRIEF OF APPELLEES

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QUESTIONS PRESENTED

Whether Congress may unilaterally abrogate existing contractual right of the State to terminate a voluntary agreement with the federal government concerning participation of State and its local subdivisions in the Social Security System?

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CODES, STATUTES AND OTHER AUTHORITIES

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On Appeal From The United States District Court For the Eastern District of California

—o—

BRIEF OF APPELLEES

—o—

OPINION BELOW

The opinion of the United States District Court for the Eastern District of California, dated May 29, 1985, is reported at 613 F.Supp. 558 (1985) and appears in the Jurisdictional Statement Appendix at pages 1a to 35a.

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JURISDICTION

The judgment of the United States District Court for the Eastern District of California was entered on May 31, 1985. Notice of Appeal was filed on June 27, 1985. On August 19, 1985, Justice Rehnquist extended the time for docketing the appeal through September 25, 1985. The Jurisdictional Statement was filed on that date. Probable jurisdiction was noted on December 2, 1985. (— U.S. —; 106 S.Ct. 521 (1985).) This Court's jurisdiction is invoked by appellants under 28 United States Code section 1252.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 United States Code section 418(a)(1) reads in relevant part:

> "The Secretary of Health and Human Services shall, at the request of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this subchapter to services performed by individuals as employees of such State or any political subdivision thereof. Each such agreement shall contain such provisions, not inconsistent with the provisions of this section, as the State may request."

42 United States Code (Supp. I) section 418(g) reads:

> "No agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983."

42 United States Code section 1304 reads:

> "The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress."

The Fifth Amendment to the Constitution reads, in relevant part:

> "[N]or shall private property be taken for public use, without just compensation."

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STATEMENT OF THE CASE

1. Background

The Social Security Act, as originally enacted in 1935, expressly excluded social security coverage for state and local government employees from social security coverage. (42 U.S.C., § 410(a)(7).) "This exclusion was deemed necessary to avoid the constitutional difficulties which would have arisen if social security taxes were levied upon a state." (*Secretary of Health, Education and Welfare v. Snell*, 416 F.2d 840, 841 (5th Cir., 1969).)

Then in 1950 when Congress amended the Act, the general exclusion of state and local government employees from social security coverage was continued in now 42 United States Code section 410(a)(7). But Congress provided that the states may voluntarily obtain social security coverage by entering into agreements with the United States.

Specifically the statute provided:

> "(a)(1) The Secretary of Health, Education, and Welfare shall, at the request of any State, enter into an agreement with such State for the purpose of

extending the insurance system established by this subchapter to services performed by individuals as employees of such State or any political subdivision thereof. Each such agreement shall contain such provisions not inconsistent with the provisions of this section, as the State may request." (42 U.S.C. § 418.)

Thus, with these amendments, states could enroll their employees and those of their political subdivisions in the Old Age, Survivors and Disability Insurance Benefits program of the Social Security Act ("Program"). (42 U.S.C. § 418(a)(1).)

On March 9, 1951, the State of California ("State") and the United States executed an agreement ("Agreement") which provided that the Program would be extended to public employees if and when the State and its eligible public agencies chose to include them.

The Agreement and the Act as they provided on January 1, 1951, permitted the State to withdraw any coverage group, that is, eligible employees of the appellee public agencies upon two years' advance notice to the Secretary. (42 U.S.C. § 418(g).)

To implement its Agreement, the State enacted enabling legislation (Gov. Code §§ 22000-03), pursuant to which Agreement and legislation the State then entered into individual agreements with those public agencies wishing to participate in the Program. Thereafter, the appellee public agencies became enrolled in the Program when the State and the United States modified the state/federal agreement to include them. (42 U.S.C. § 418(c)(4).) The appellee public agencies were required by the State's enabling legislation to make certain "contributions" to the State as payment for their participation. (Gov. Code,

§§ 22551-53.) As permitted by that legislation, the appellee public agencies could withdraw from coverage (and concomitant liability to the State), upon two years' advance notice to the State. (Gov. Code, § 22310.)

Since that time, a series of amendments further broadened the Act's potential coverage of state and local employee. A 1954 amendment to section 418 permitted state and local employees covered by state retirement plans to acquire coverage under a federal-state agreement after an affirmative referendum vote of the employees involved. Social Security Amendments of 1954, chapter 1206, title I, section 101, h(1)-(8), 68 Statutes 1055, 1059. (Codified at 42 U.S.C. § 418(c), (d), (f), (m), (n), as amended). A 1956 amendment allowed certain states to divide their retirement systems into two parts—one composed of positions of members desiring coverage and the other of those opposed to coverage, to treat each part as a separate retirement system for purposes of extending coverage, and to agree to coverage for only the part which favors it. The ability to divide the state system in this way is conditioned upon the state's agreeing that the positions of individuals who join the state system after coverage is extended will thereafter be included in the retirement system coverage group. Social Security Amendments of 1956, chapter 836, title I, section 104(e), 70 Statutes 823, 825, 826. (Codified at 42 U.S.C. § 418(d)(6)(C), as amended.) A 1957 amendment added the State of California to the group of states able to exercise this option. Social Security Amendments of 1957, Public Law No. 85-227, section 1, 71 Statutes 512. (Codified at 42 U.S.C. § 418(d)(6)(C), as amended.)

In April 1983, Congress enacted Public Law No. 98-21, section 103(a) and (b), amending 42 United States Code

section 418(g), to provide that "[n]o agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983." In other words, this amendment prevented any state from withdrawing coverage for any set of its employees, even if a termination notice had been filed and was pending at the time Public Law No. 98-21, section 103(a) and (b) was enacted.

Through April 1983, the State, which had a section 418 Agreement with the Secretary since 1951, had filed termination notices on behalf of approximately 70 of its political subdivisions with approximately 34,000 employees. However, Public Law No. 98-21 prevented the termination from taking place in due course.

The appellees then filed these suits to challenge the amended section 418(g), which prohibited the State and the appellee public agencies from withdrawing from the Program.

The district court decided that the Agreements were contracts and thus properly within the meaning of the Fifth Amendment's Takings Clause. The district court also found that the right to withdraw was a contractual right and went on to conclude, therefore, that Congress could not deprive the State and the appellee public agencies of that right without just compensation. However, the district court said it could not order "just compensation" in the usual sense because of the unique circumstances. Instead, the court declared that amended section 418(g) is void and that the State and its political subdivisions have the lawful right to withdraw from the Program.

2. The Opinion Of The United States District Court

In the district court the appellee State challenged the constitutionality of the amendment which eliminated the provision permitting public agencies to withdraw from the Social Security System. The district court granted summary judgment to appellee State, holding that the public agencies were vested with the contractual right to withdraw from the system and that the right constitutes private property within the meaning of the Just Compensation Clause of the Fifth Amendment, and that this property was taken from them by the United States without the "just compensation" mandated by that claim. The court further found that to award just compensation in this case would frustrate the very purpose in passing the statute. Accordingly, the court declared the statute unconstitutional to the extent that it prevents the appellee State from withdrawing from the Program.

The court noted that the appellants had failed to separate the terms of the Agreement from the terms of the Act itself. The court stressed the fact that "*Both* the Agreement and the statute provided that the State could withdraw after giving two years' advance notice." That is, the State's right to withdraw did not exist solely by virtue of the statute; it existed from the plain terms of the contract, which it had executed with the United States. The court concluded that because of the Fifth Amendment, Congress is simply not free to deprive the State of its contractual right without just compensation.

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SUMMARY OF ARGUMENTS

I. A. The Agreement executed in 1951 between the United States and State was a contract in its true legal sense where both parties exchanged valuable consideration to attain their respective objectives. That contract was a negotiated one and contained such provisions as were agreeable to State. As the district court held, under any definition of a contract, the 1951 Agreement was a contract.

B. The principle is well established that because contractual rights against the government are property interests protected by the Fifth Amendment, Congressional power to abrogate existing government contracts is narrowly circumscribed. In order to avoid the effect of this rule appellants have ignored the Agreement of the parties and sought to analogize the Social Security Program with general, run-of-the-mill federal welfare and disbursement programs. The absence of any express contractual agreement in the case of the latter makes any comparison between the two nonsensical.

C. The termination provision in the contractual Agreement is binding upon the appellants and cannot be legislated away by a later Congressional act. In 1951 when the State entered into the Agreement, section 418 provided that the federal-state agreements may not contain provisions that are inconsistent with the provisions of section 418. The Agreement which was executed in 1951 between the United States and State did not contain any provisions which were inconsistent with section 418. The alleged inconsistency arose with the enactment of the 1983 Amendment. The appellants have been unable to refer

this Court to a single authority that overrules the settled principle of law that when the United States with constitutional authority makes contracts, it has rights and incurs responsibilities similar to those of private contracting parties. Instead, appellants have averted to cases dealing with the sovereign power to tax, rulemaking powers of federal agencies and police powers, none of which help solve the issue before this Court.

II. The real reason for the 1983 Amendment was to solve the financial crisis that had fallen upon the Social Security System. And not only is the law clear that the United States cannot abrogate a contract because of the need for money, the appellants concede that point. For this reason, the appellants' action in unilaterally eliminating the termination right constitutes an impermissible abrogation of the Agreement.

III. The 1983 Amendment effected a taking. The fact that the United States eliminated the expressly bargained for contractual right to withdraw from the System in itself demonstrates that there was a taking. In addition to the drastic nature of the Congressional action, there was an enormous economic impact upon the State. Because of the amendment, the State would be required to administer two programs and to pay for two retirement systems—the Social Security System and Public Employees Retirement System. Finally, the 1983 Amendment caused an obvious interference with investment-backed expectations in that the State is now required to pay social security contributions based on 7.05 percent of each individual's earnings up to $39,600, which is substantially more than the approximately two percent of $3,600 total compensation when the State entered into the

Agreement in 1951. Thus, under even the strictest test, the United States' action constitutes a taking.

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INTRODUCTION

In its opinion, the district court held that apart from the statute, the State has a contractual right to withdraw from the System. The court recognized that Congress may change the statute to prevent withdrawal in the future but that it may not abrogate or repudiate the State's contractual rights. Appellants have argued basically that these agreements are not true contracts in the legal sense but something less than that. But the authorities upon which appellants rely hardly support their positions. The salient point to keep in mind is that we are dealing only with an issue involving express contracts to which the federal government is, by the terms of the contract, one of the parties to the Agreement. Any discussions pertaining to other types of contracts or arrangement or contracts where the federal government is not a party are simply irrelevant.

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ARGUMENT

I. APPELLANTS ARE BOUND BY THEIR CONTRACTUAL RELATIONSHIP WITH THE APPELLEES

A. The United States-California Agreement Was A True Contract

The crux of this case centers around the Agreement that was entered into on March 9, 1951, effective as of January 1, 1951, between "the United States acting through the Federal Security Administration by virtue of the authority vested in him by section 418 of the Social Security Act, as amended" and the State of California by virtue of the authority granted by California statute. In essence, two separate sovereigns, the United States and California, each dominant in its own sphere (*Parker v. Brown*, 317 U.S. 341 (1941); *Redding v. Los Angeles*, 81 Cal.App.2d 888 (1947), app. dism. 334 U.S. 825 (1945), entered into a contractual arrangement.

As the district court noted, the Agreement in question evidences an agreement between the parties that each promises to do certain things and to assume certain obligations. The appellants agree to place State and local public employees in the Social Security System. State agrees to make payments and comply with regulations to carry out the purposes of section 418 of the Act. The State is given the opportunity to modify the Agreement to extend coverage under certain circumstances and also to terminate the Agreement. At the same time, the appellants have the right to terminate if State fails to comply with any provisions of section 418 of the Act or if State fails to make payments when due. Moreover, both

the United States and State repeatedly referred in their Agreement to section 418 of the Act and nothing else. Certainly, if other provisions of the Act were to be incorporated into the Agreement, they could have done so. In the absence of such an incorporation, nothing can be taken by implication against State as the sovereign. (*Singleton v. Bonnisen,* 131 Cal.App.2d 327 (1955).)

A careful examination of the Act will demonstrate further that Congress had intended that the Agreement between the United States and State be a true contractual agreement. For example, the Act provides that each agreement shall contain certain provisions which the contracting state may request so long as they are not inconsistent with the provisions of section 418 ((a)(1)); the agreement shall exclude certain classes of employees if the contracting state requests it ((c)(3)); the United States shall modify the agreement at the contracting state's request to include certain classes of employees ((c)(4)); the agreement shall exclude agricultural workers and students if the contracting state requests it ((c)(5)). These are merely examples; the section is replete with provisions giving the contracting states certain options and rights upon the states' requests.

The Agreement executed by State with the United States was a negotiated contract. This fact was expressly noted by Congress on May 27, 1952 when it was seeking to amend the Act to provide retroactive coverage under the programs for those states which had not yet enacted enabling legislations to enter into agreements. The Senate declared that state statutory authority is required before a state agency can enter into a coverage agreement with the Federal Security Administrator, and that "Such agreements have been negotiated by more than three-fourths of the States. . . . This bill would grant to the States which have not yet negotiated an agreement . . . [additional year] to enter into an agreement." (United States Code Congressional and Administrative News, 82d Cong. 2d sess. 1952, vol. 2, pp. 1774-1775.)

As the above report stated, the United States has negotiated separate agreements with each of the states. There are various provisions in section 418 which provide special treatment for various states by name. (See *e.g.*, subds. (d), (m), (o) and (p).) In addition, there have been uncodified statutory modifications to particular state/United States agreements. (See pp. 302-309 of 1983 edition of 42 United States Code sections 406-1000.)

Further evidence of the existence of a true contract is found in the consideration that was exchanged in the formation of the agreement. State yielded its freedom of not being subjected to the Social Security Act and the obligations that accompanied the Agreement to gain the benefit that accrued from the contract. For the United States, the use of a contract was necessary because it believed that the states could not be subjected to a social security tax.[1]

Thus, the district court correctly held that, "Under any definition of contract, this is a contract. See e.g., *Wood v. United States,* 724 F.2d 1444, 1449 (9th Cir. 1984) (citing *Pennhurst State School & Hospital v. Holderman,* 451 U.S. 1, 17 (1981))." (*Pub. Agencies Opp. To Soc. Sec. Entrapment v. Heckler,* 613 F.Supp. 558, 573 (D.C. Cal. 1985).)

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1. See H.R. Ways and Means Subcommittee Report on Soc. Sec., May 21, 1982, p. 3.

B. California's Rights Under The Agreement Are Contractually Derived And Protected By The Fifth Amendment And Are Not The Products Of Federal Welfare/Disbursement Programs

This Court has reiterated the established rule that because contractual rights against the government are property interests protected by the Fifth Amendment, Congressional power to abrogate existing government contracts is narrowly circumscribed.[2] (*Perry v. United States,* 294 U.S. 330 (1935); *Lynch v. United States,* 292 U.S. 571 (1934); *F.H.A. v. Darlington,* 358 U.S. 84, 97-98 (Harlan, J. dissenting).) This Court in *Perry v. United States, supra,* 294 U.S. 352-353, said:

> "When the United States, with constitutional authority makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference, said the Court in *United States v. Bank of the Metropolis,* 15 Pet. 377, 392, except that the United States cannot be sued without its consent. See, also, the Floyd Acceptances, 7 Wall. 666, 675; *Cooke v. United States,* 91 U.S. 389, 396. In *Lynch v. United States,* 292 U.S. 571, 580, with respect to an attempted abrogation by

2. As early as 1795, Alexander Hamilton had said in his communication to the Senate (3 Hamilton's Works, 518, 519), that:

> " . . . when a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with the power to make a law which can vary the effect of it."

> the act of March 20, 1933 (48 Stat. 8, 11) of certain outstanding war risk insurance policies, which were contracts of the United States, the Court quoted with approval the statement in the *Sinking-Fund Cases, supra,* and said: 'Punctilious fulfillment' of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation.' "

This principle was again recognized by this Court in the case upon which appellants heavily rely, namely, *National Railroad Passenger Corp. v. Atchison, T. & S.F. Ry. Co.,* — U.S. —; 105 S.Ct. 1455, fn. 24 (1985):

> "There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements. . . . To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government. *Perry v. United States,* 294 U.S. 330, 350-351, 55 S.Ct. 432, 434-435, 79 L.Ed. 912 (1935)."

Ignoring this elementary law of contracts, appellants argue that section 418 agreements are similar to general social welfare programs, particularly in that the adminis-

trative and judicial review procedures "parallel those applicable to most federal programs." Yet appellants do not refer to any single federal program in particular. As a matter of fact, the procedures for administrative and judicial review under the Social Security Act are remarkably similar to those applicable to federal tax matters, which by no means can be called a "federal program."

In support of their position, appellants analogize the Social Security Program to title I, Elementary and Secondary Education Act of 1965 federal grants. (*Bennett v. Kentucky Department of Education,* No. 83-1798 (Mar. 19, 1985), slip. opn.; *Bennett v. New Jersey,* No. 83-2064 (Mar. 19, 1985), slip opn.; *Bell v. New Jersey,* 461 U.S. 773 (1983).) Appellants have selected a number of passages from these three cases and integrated them into their argument that section 418 agreements such as the Agreement here merely "establish the conditions that govern current participation in the System, and describe the ongoing rights and responsibilities of the state and federal governments," and that a "cooperative federal-state program such as the one established by section 418 'cannot be viewed in the same manner as a bilateral contract governing a discrete transaction' (*Bennett v. Kentucky*)." (App. Br., p. 18.) Petitioners further contend that the Social Security Program is nothing more than a "welfare and disbursement program" created by Congress.

But appellants fail to answer the question of the effect an express, written federal-state agreement which exists in this case has upon the so-called welfare and disbursement program. After making its ill conceived analogy with the "welfare and disbursement" programs, appellants cavalierly dismiss the written Agreement with

California by stating that "there is no talismanic significance to the existence of a separate writing signed by a representative of the federal government."[3] (App. Br., p. 21.)

Nor do the appellants discuss the terms of the statute pursuant to which California entered into the section 418 Agreement. As noted previously, that section gives a wide degree of discretion to the states in the negotiation of an agreement for coverage under the Act. The section has a number of provisions which give the states the rights to modify, include or exclude coverage. Even the Agreement that was executed by State expressly gives it the right to modify the contract. Certainly, in view of these rights to modify, include or exclude coverage, the express rights given to certain states specifically identified by name and the voluntary character of the programs, there can be no doubt that the state and political subdivisions' participation in the Program was a contractual one and not as a beneficiary of a federal grant.

Finally, appellants contend that section 418 agreements have none of the indicia of typical contracts. (App. Br., p. 22) Yet, because of the lack of any merit to this claim, appellants have failed to describe what are these typical indicias. As discussed at length above, the section 418 agreements are contracts in the true legal sense. The most telling evidence in this regard is the mutual consid-

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3. This is truly a strange response to the established principle of federal law that "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation with all the wrong and reproach that the term implies, as it would be if the repudiation had been a state or a municipality or a citizen." (Sinking-Fund Cases, 99 U.S. 700 (1878).)

eration that was exchanged in the formation of the contract —United States needed a voluntary assent of the State because it believed it could not compel State to enter into the Program, and the State was able to place certain of its employees and its political subdivisions who would otherwise be excluded under the Program.

C. The Termination Provision Of The Agreement Is Binding Upon The United States

Appellants next argue that because section 418 agreements provide that federal-state agreements may not contain provisions that are "inconsistent with the provisions of this section," and because Congress amended section 418 to eliminate the termination privilege, the termination privilege is now inconsistent with section 418 and, therefore, no longer enforceable. (App. Br., p. 24.) But appellants misread section 418(a)(1), which states in relevant part as follows:

> "Each such agreement shall contain such provisions, not inconsistent with the provisions of this section, as the State may request."

This section clearly states that the agreements shall contain only such provisions, not inconsistent with this section, as the State may request. Here when the Agreement was executed on March 9, 1951, State requested and secured a provision permitting termination which was consistent with the provisions of section 418.[4] Since that time

4. Paragraph (F) of the Agreement provided that "That State, upon giving at least two years' advance notice in writing to the Administrator, may terminate this agreement. . . ."

State has not requested any provisions that are inconsistent with section 418. Instead, it is the United States which has amended section 418 and now seeks to foist the amendment upon State. Thus, appellants argument that "because the termination provision of California's Section 418 agreement is now inconsistent with the amended Section 418, that provision is unenforceable" (App. Br., p. 24) is no argument at all. It leaves unanswered the basic question of whether Congress can abrogate a contractual provision.

Appellants vigorously argue that in order to make the termination provision binding upon the United States, the statute must have expressly provided that only provisions that are inconsistent with the terms of section 418 as it was originally enacted are invalidated. That is absurd. There was no need for such language because the statute provided in 1951 that the agreement will contain such provisions *as the states may request* and that are not inconsistent with section 418. State entered into the Agreement in 1951 and relied and acted upon the United States' offer. In 1951, State requested provisions that were not inconsistent with section 418. It is obvious that State would not request a provision such as the right of termination if it knew that the right was inconsistent with the Act. Thus, the only reasonable reading of section 418(a)(1) in its entirety is that the provisions requested by State and which are not inconsistent with section 418 are those provisions of the agreement and statute as they existed at the time of the execution of the contract. Any other interpretation of section 418(a)(1) would not make sense.

Appellants then argue not only that pursuant to 42 United States Code section 1304 Congress has repealed

the termination right, but also that contractual arrangements remain subject to subsequent legislation. As far as the former is concerned, there is no doubt that Congress can repeal or modify the statute. But as the district court noted:

> "Even if Congress' power to amend the statute is incorporated into the contract, such incorporation does not address the question of whether, when Congress exercises that power, it may deprive the State of its existing contractual rights without compensation. By virtue of the Fifth Amendment, Congress is simply not free to deprive the State of its contractual right without just compensation." (*Pub. Agencies Opp. To Soc. Sec. Entrapment v. Heckler, supra,* 613 F.Supp. at 574.)

The decisions upon which appellants rely hardly support their second contention. Aside from *National Railroad Passenger Corp. v. Atchison T. & S.F. Ry., supra,* — U.S. —; 105 S.Ct. 1441, appellants refer to *Merrion v. Jicarillo Apache Tribe,* 455 U.S. 130 (1982), which is completely inapposite. Appellants have paraphrased totally out of context the following passage from *Jicarillo:*

> "It has thus repeatedly held that '[c]ontractual arrangement remain subject to subsequent legislation by the presiding sovereign . . . unless [t]he sovereign's ability to enact such legislation] "has been specifically surrendered in terms which admit of not other reasonble interpretation."' *Jicarillo Apache Tribe,* 455 U.S. at 147-148 (quoting *City of St. Louis v. United Rys.,* 210 U.S. 266, 280 (1908).)" (App. Br., p. 26.)

Yet, the foregoing paraphrased passage from *Jicarillo* hardly reflects the actual statement that this Court had made, namely:

> "Viewed in this light, the absence of a reference to the tax in the leases themselves hardly impairs the Tribe's authority to impose the tax. Contractual arrangements remain subject to subsequent legislation by the presiding sovereign. See, e.g., Veix v. Sixth Ward Building & Loan Assn. of Newark, 310 US 32, 84 L Ed 1061, 60 S Ct 792 (1940); Home Building & Loan Assn. v. Blaisdell, 290 US 398, 78 L Ed 413, 54 S Ct 231, 88 ALR 1481 (1934). Even where the contract at issue requires payment of a royalty for a license or franchise issued by the governmental entity, the government's power to tax remains unless it 'has been specifically surrendered in terms which admit of no other reasonable interpretation.' St. Louis v. United R. Co., 210 US 266, 280, 52 L Ed 1054, 28 S Ct 630 (1908)." (*Id.* at p. 147-148.)

As is evident from the foregoing, in *Jicarillo* this Court held that the failure to mention severance taxes in the oil leases on tribal lands did not prohibit the Indians from imposing the tax because the Indians always had the sovereign power to tax. The fact that the sovereign retained the power to tax irrespective of the contract's silence on that subject has no bearing upon the rights and obligations that are set forth in the instant parties' Agreement. Thus, the appellants' construction of the passage from *Jicarillo* is a far cry from this Court's actual words and certainly does not stand for the proposition that the United States has unlimited power to rearrange any contractual right and obligation by subsequent legislation.

Appellants continue their attack with references to decisions that are meaningless here. For example, appellants cite *Thorpe v. Housing Authority,* 393 U.S. 268, 279 (1969) for the proposition that a federal agency may impose upon a party with whom it has a contract an additional obligation not contained in the contract when that obli-

gation is imposed under the agency's wholly independent rule making power. But here we are not talking about any rule making power; we are discussing Congress' power to abrogate an essential provision of the contract, a part without which State would not have entered into the contract.

Others such as *New York Rapid Transit Corp. v. City of New York,* 303 U.S. 573 (1938) and *Puget Board Power and Light Co. v. Seattle,* 291 U.S. 619 (1934), deal strictly with local governmental matters and have no bearing on the issue of whether Congress can unilaterally abrogate United States' contract with State.

Appellants then incongruously seek to tie in a state police power case with Congress' alleged power to abrogate United States' contract with State and, in the process, again paraphrase out of context a passage from *Boyd v. Alabama,* 94 U.S. 645, 650 (1876). In *Boyd* this Court did not state that when "one legislature, by [a] contract with an individual, . . . restrain[s] the power of a subsequent legislature to legislate for the public welfare." (App. Br., p. 27.) Instead, what this Court in fact stated is substantially different from the impression that appellants seek to leave here as demonstrated by the statement originally made, namely, that one legislature by a contract with an individual, probably cannot "restrain the power of a subsequent legislature to legislate for the public welfare, and to that end suppress any and all practices tending to corrupt the public morals." There certainly is no public morals issue here.

However, appellants continue with their police power contention at great length:

> "From the earliest days of the Republic, the Court has made it plain that the property clauses of the Constitution—the Takings, Due Process and Contract Clauses—do not require the federal or state governments 'to adhere . . . to contract[s] that surrender [ ] an essential attribute of [their] sovereignty.'" (App. Br., p. 32 et seq.)

In support of this contention appellants discuss a number of cases[5] dealing with a state's police power to abrogate contracts for the sake of public safety. The inappropriateness of appellants' cited cases is evidenced by the singular fact that not one of them involved the United States as a party to the contract. Thus, appellants' reliance on these state police power cases is misplaced. Moreover, their statement that "Against this Background, the Court repeatedly has rejected challenges to legislative action that impaired or abrogated contractual obligations that purported to restrict the government's right to legislate for the public welfare" (App. Br., p. 33) is meaningless inasmuch as the "background" referred to is based on cases concerning state police power. None of those cases involved an express contract entered into by the United States.

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5. *Northern P. Ry. v. Minnesota* ex rel. *Duluth,* 208 U.S. 583, 598 (1908); *Indiana* ex rel. *Anderson v. Brand,* 303 U.S. 95, 108-109 (1938); *City of El Paso v. Simmons,* 379 U.S. 497, 508 (1965); *Pierce Oil Corp. v. City of Hope,* 248 U.S. 498, 501 (1919); *Northern P. Ry., supra,* 208 U.S. at 597; *New Orleans Gas Light Co. v. Drainage Comm'n,* 197 U.S. 453, 460 (1905); *Chicago B. & Q. R.R. v. Nebraska* ex rel. *Omaha,* 170 U.S. 57, 72 (1898); *Butchers' Union Co. v. Crescent City Corp.,* 111 U.S. 746, 751 (1884); *Stone v. Mississippi,* 101 U.S. 814, 817 (1880); *Beer Co. v. Massachusetts,* 97 U.S. 25, 33 (1877). See *United States Trust Co. v. New Jersey,* 431 U.S. at 23 n. 20. Cf. *Horowitz v. United States,* 267 U.S. at 461; *Pennsylvania Hospital v. City of Philadelphia,* 245 U.S. 20, 23-24 (1917); *Goszler v. Georgetown,* 19 U.S. (6 Wheat.) 593, 597-598 (1821).

Curiously, amidst their police power analogies appellants also have interjected two more straw issues which have no place here. First, appellants raise a nonexistent issue with their statement that "Yet there is absolutely nothing in the section 418 agreement at issue here . . . that purports to insulate appellees (or any participating state) from the effects of legislative changes in the Social Security System." (App. Br., p. 28.) Obviously, State is not asserting that section 418 insulates it from any changes in the System. Rather, it is simply contending that unilaterally abrogating a term of an express contract and amending a statute are two separate matters.

Second, appellants discuss social security benefits which are not an issue here and refer to *Flemming v. Nestor*, 363 U.S. 603 (1960) to support their position that:

> "It was doubtless out of an awareness of need for such flexibility that Congress included in the original Act, and since has retained, as clause expressly reserving to it '[t]he right to alter, amend or repeal any provision' of the Act. . . . That provision makes express what is implicit in the institutional needs of the program." (App. Br., p. 29.)

This statement merely reiterated the rule that social security benefits are not contractual and may be altered at any time.[6] Appellants' other cases such as *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) and *Richardson v. Belcher*, 404 U.S. 78 (1981), among others, merely restate the foregoing. Here we are not attempting to resolve questions about social security benefits, their size or the eligibility

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6. Interestingly enough, the Court also said that Congress may not modify the statutory scheme of the Program "free of all constitutional restraint." (*Id.*, at 611.)

for them. Instead, we are talking about the ramifications of section 418 upon the express terms of the Agreement itself.

Thus, it is clear that appellants, after engaging in a prolonged, rambling discussion about welfare and disbursement programs, police powers to protect the public welfare and social security benefits, have been totally unsuccessful in finding legal justification for the United States' abrogation of its express Agreement with the State here.

II. THE 1983 AMENDMENT WAS ENACTED TO RESOLVE A FINANCIAL CRISIS

Inspite of appellants' long discussion setting forth their interpretation of the reasons for the 1983 amendment to the Act, it is undisputed that the principal motivation for the amendment was the financial crisis that the system faced. (*Infra* at p. 27.) Congress was not exercising any "federal police power or some other paramount power" (*Lynch v. United States, supra,* 292 U.S. 579) when it amended the Act in 1983. Congress was merely trying to solve a financial crisis in the System. Moreover, the various motivating factors that appellants refer to as having propelled the 1983 amendment, and particularly their statement that Congress concluded that the " 'voluntary coverage provision can be seen as an anomaly in the context of a basically mandatory system' " (App. Br., p. 41), are undercut by the undisputed fact that Congress has not at-

tempted to require all state and local employees to come under the System's coverage.[7]

On the other hand, in the leading case involving the United States as a party to the contract, this Court made clear that while Congress may impair existing contract rights in the exercise of a paramount government power such as the "War Powers" (U.S. Const., art I, § 8, cl. 11, 12, 14), Congress is without power to reduce its obligations by abrogating contractual obligations of the United States." (*Lynch v. United States, supra,* 292 U.S. 580.) By the same token Congress cannot unilaterally increase the contractual obligation of the states as it has done here by forcing the states to remain in the system.

Other cases dealing squarely with the issue of the abrogation of contractual obligations of the United States have consistently held that the power of the United States to abrogate contracts is indeed limited. Appellants attempt to distinguish these decisions on the basis that they centered on financial or debt matters which cannot be repudiated. But appellants have virtually conceded that their action in withdrawing the termination right comes within the proscription of *Lynch*. For appellants take the position that:

> "*Lynch* thus stands only for the proposition that '*need for money* is no excuse for repudiating contractual obligations.' *United States Trust*, 431 U.S. at 26 n.25. See *National Passenger Rail Corp.*, slip op. 20 n. 24 (characterizing *Lynch* as subjecting the contractual abrogation to special scrutiny because it involved an attempt to 'maintain the credit of public debtors')." (Emphasis added; App. Br., p. 37.)

7. As of the 1983 amendment, public employees of Alaska, the only state to withdraw from the System, Maine, Massachusetts, Nevada and Ohio, and those public employees whose coverages were effectively terminated prior to the 1983 amendment, were and are still not covered by the System.

That is precisely what has happened here in that Congress amended 42 United States Code section 418 because of the need for more money to keep the System adequately funded. As the House of Representatives Committee on Ways and Means stated in its report on the 1983 amendment:

> "The social security system . . . is facing under current law a major cash shortfall over the next decade. . . . If nothing more were done than to extend interfund borrowing authority, the three combined funds (OASDHI) would be unable to pay benefits on time beginning in the spring of 1984. The critical shortfall lasts through 1990. . . .
>
> "The short-term financing crisis for the OASI program is the result of two factors: (1) five years of recurring cycles of high inflation coupled with low productivity and high unemployment; and (2) insufficient reserve levels provided by the tax increases and benefit reforms enacted in 1977. . . .
>
> "Titles I, II and III of your Committee's bill are therefore intended to restore the financial soundness of the old age and survivors' and disability insurance trust funds, both in the short-term and over the entire seventy-five year forecasting period." (H.R. Report on Soc. Sec. Amend. of 1983, Mar. 4, 1983, pp. 11-13.)

Thus, Congress has done exactly what appellants admit that it cannot do, namely, repudiate an existing contract because of the need for more money.

Finally, in an effort to direct this Court's attention away from the real issue of whether Congress can abrogate the express terms of a contract appellants have raised

again the illusory issue discussed above. In this regard appellants state:

> "If Section 418 agreements are contracts that must be construed to foreclose the federal government from mandatorily enrolling participating states in the System, they plainly fall within the first category of contracts outlined above—those that create no vested rights because they purport to deny the government the authority to take action essential to the general welfare. Section 418 agreements are not 'purely financial' arrangement like revenue bonds (*United States Trust,* 431 U.S. at 25.) Instead, they are the mechanism that Congress used to provide welfare and insurance protection to millions of workers. If the agreements foreclose Congress from legislating in this area, and thus from protecting a large portion of the workforce against 'the risks and uncertainties of advanced industrial society' (H.R. Comm. Print 97-32, at 7), they plainly surrender—impermissibly—an essential attribute of federal sovereignty."

The truth is that Congress probably can mandatorily enroll all the states in the System. But if that is Congress' desire, then it must do so by separate legislation. Appellee state is not arguing that Congress does not have the power to impose a mandatory coverage system. Appellee simply is stating that the Congress must take these steps in proper sequence, namely, first abide by the terms of the agreements with respect to the right to terminate, and then pass legislation requiring all states and their political subdivisions to become members of the System.

III. THE 1983 AMENDMENT EFFECTED A TAKING WITHIN THE MEANING OF THE FIFTH AMENDMENT

As discussed above, section 418 Agreements are property that was taken by Congress when it enacted the 1983 Amendment. Such agreements also are property that is entitled to constitutional protection within the meaning of the Taking Clause of the Fifth Amendment.

Appellants contend that since "government regulation —by definition—involves the adjustment of rights for the public good" (*Andrus v. Allurd,* 444 U.S. 51, 65 (1979)), there was no taking here. Appellants concede that there are no fixed formulas to determine when a regulation crosses the permissible line and effects a taking. Although this Court pointed out that the resolution of the takings issue in each case "ultimately calls as much for the exercise of judgment as for the application of logic" (*Id.*), it has also examined three specific considerations at times to resolve the issue.

In this case the appellants rely heavily on the alleged absence of these three considerations in support of their position that there was no taking. These three considerations are the character of the government action, its economic impact and its interference with reasonable investment-backed expectations. (*Prune Yard Shopping Center v. Robbins,* 447 U.S. 74, 83 (1980); *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978).) Here the character of the 1983 Amendment clearly evidences a taking. By a stroke of the pen Congress eliminated a significant right that State had acquired by an express contract. Although the appellants argue that to find takings in this case would be tantamount to regulation

by purchase, they forget that the State's right in this case was acquired through negotiation as part of the consideration for the contract.

There can be no doubt that the 1983 Amendment had an enormous economic impact on the State. Because the State now cannot withdraw from the System, it must continue to fund at least two types of retirement plans for their employees—Social Security System and the State's Public Employees Retirement System. This drain on the State's resource is extremely painful and will become even more exacerbating if the Gramm-Rudman Act eventually is ruled to be valid.

Finally, the 1983 Amendment obviously caused an impermissible interference with "reasonable investment-backed expectations." When the State first entered into the Program pursuant to the Agreement and enabling State legislation, the rate of contribution was miniscule in comparison to 1985's rate of 7.05 percent of total compensation to a maximum of $39,600. Even in today's inflated economy an annual obligation of $2,792 for a person in the maximum salary level is far removed from the approximately $100 that was required in 1951. Thus, even under the three considerations test, the 1983 Amendment constitutes a clear taking.

———o———

CONCLUSION

We respectfully urge that the judgment of the district court be affirmed.

DATED: March 14, 1986

Respectfully submitted,

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Attorneys for Appellee

No. 85-521

In The

Supreme Court of the United States

October Term, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Appellants,

v.

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.,

Appellees.

UNITED STATES OF AMERICA, ET AL.,

Appellants,

v.

STATE OF CALIFORNIA,

Appellee.

On appeal from the United States District Court for the Eastern District of California

BRIEF ON THE MERITS FOR APPELLEES PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.

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QUESTIONS PRESENTED

1. Whether the fundamental principle that Congress is without power unilaterally to repudiate contractual obligations of the United States may be ignored by Congress in enacting legislation which unilaterally abrogates and/or repudiates a provision of a written contract entered into by the United States as a party thereto.

2. Whether the unilateral abrogation and/or repudiation by Congress of the agreed upon right to withdraw from the Social Security system, which right is one provision of a larger written contract between the United States and the State of California and its political subdivisions, effected a "taking" of property within the meaning of the Fifth Amendment.

PARTIES TO THE PROCEEDING

The list of parties plaintiff in Appellants' Brief on the Merits is incomplete. Accordingly, a complete list hereby is submitted as follows:

Public Agencies Opposed to Social Security Entrapment (POSSE)

General Law Cities:

Alturas
Arcata
Lincoln
San Clemente
San Anselmo

Charter City:

Redondo Beach

Special Districts:

Aromas Tri-County Fire Protection District
Bear Mountain Recreation and Park District
Big Bear Municipal Water District
Delano Mosquito Abatement District
Humboldt Community Services District
Marin Municipal Water District
North Bakersfield Recreation and Park District
Paradise Irrigation District
Paradise Recreation and Park District
Pico Water District
Placentia Library District
Rancho Simi Recreation and Park District
Salispuedes Fire Protection District
Yorba Linda Library District

Individual Plaintiffs:

Katherine T. Citizen
Margie Hunt
William Rasmussen

(See Amendment to Amended Complaint, District Court Record Docket Nr. 28 dated January 4, 1984.)

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BRIEF ON THE MERITS FOR APPELLEES PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.

STATEMENT

Of the twenty-four Appellees herein (hereafter "Public Agencies"), twenty are public agencies within the State of California. Six are cities while fourteen are special dis-

tricts organized pursuant to the laws of California. Many if not most are participants in California's Public Employees' Retirement System ("PERS").

For a number of years prior to the creation of the Social Security System ("System") in 1935, California had provided a retirement system both for its own employees and those of its political subdivisions. (See generally, California Government Code Section 20002 *et seq.*) The Social Security Act ("Act") was passed to meet a need. In California that need already was being met for public agencies by PERS. It therefore made sense that the Act as originally contemplated generally excluded state employees except those who were not already protected by a retirement system. Protection was the Act's purpose. And protection was necessary only for those who did not already have coverage.

A further consideration in excluding such employees from the System was "questions as to the constitutionality of any general levy of the employer tax on States and localities." (For a discussion of the evolution of the involvement of State and local governments in the System please refer to *Brief of Council of State Governments, et al., as Amici Curiae in Support of Appellees,* Statement, hereinafter cited as "*Amici Br.*")

So it was that when the 1950 Amendments were enacted, the relevant section was entitled "*Voluntary* Agreements for Coverage of State and Local Employees." (1950 Amendments Sec. 106 adding Sec. 218 to the 1935 Act; 42 U.S.C. 418, referred to herein as Section 418.) (Emphasis added.) Underscoring the voluntary nature of state and

local participation is the directive of Section 418 that the "Administrator shall, *at the request of any State,* enter into an agreement. . . ." (Emphasis added.)

Further underscoring the voluntary nature of the coverage 42 U.S.C. 418(g) provided that a state was at liberty to terminate the coverage of its own employees or those of its political subdivisions "at the instigation of the State or at the request of the political subdivision itself." Subcommittee on Social Security of the House Committee on Ways and Means. 97th Cong., 2d Sess., WCMP: 97-34, *Termination of Social Security Coverage for Employees of State and Local Government and Nonprofit Groups* 20 (Comm. Print 1982). The right to terminate was seen by Congress as a "necessary corollary" to the voluntary nature of state and local participation. (*Id.,* at 3).

It was against that background that, effective January 1, 1951, the United States executed such a written Agreement ("Agreement") with the State of California ("State"). The Agreement provided for the extension of Social Security coverage to the State and to local "coverage groups." It was signed on behalf of the State by California's Director of Finance and on behalf of the United States by the Acting Federal Security Administrator. (J.A. 29-33).

The Agreement provided that the State could upon fulfillment of certain prerequisites, withdraw its own employees or those of any coverage group upon two years' written notice to the Secretary. (See J.A. 31 par. (F)—Termination by the State).

To implement the Agreement with the United States the State enacted enabling legislation authorizing the

State to enter into individual agreements with its political subdivisions at their request. (California Government Code Section 22000 *et seq.* Deering's 1973 and 1986 Supp.). The Public Agency Cities and Special Districts are among those entities which chose to participate in the System. Their agreements with the State were binding.

While all of the agreements between the Public Agencies and the State are not identical they contain essentially the same terms. Virtually all contain words such as these found in the agreement between the City of Redondo Beach and the State:

> "8. After the filing of this application and agreement, its acceptance and execution by the State shall constitute it a *binding agreement* between the Applicant and the State of California with respect to the matters herein set forth." (Emphasis added.)

(Page 302 of *Exhibit A to Declaration of Richard T. Baker* in Support of Motion for Summary Judgment dated October 17, 1983, *District Court Docket Entry 11*, hereinafter "Docket Entry 11").

In choosing to enter the System the Public Agencies were well aware of the termination option authorized by Section 418(g) and contained in the Agreement. They further noted that the State's enabling legislation also provided that option. (California Govt. Code Sec. 22310). Each of their individual agreements with the State contained a provision incorporating that option.[1] In fact, the

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[1] The termination provisions are not uniform. While all incorporate the requirements of Section 418(g), approximately half of the agreements executed by Appellee Public Agencies contain the additional requirement that the right of the Public Agen-

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option to terminate was a "substantial factor" in the decision by the Public Agencies to enter the System. (See *Affidavit of Richard J. Ramirez,* J.A. 72, par. 13, and *Affidavit of Richard T. Baker* in Support of Motion for Summary Judgment or Partial Summary Judgment 3, par. 6, attached to Plaintiff's Notice and Motion, *District Court Docket Entry 10* dated 10/17/83 hereafter "Docket Entry 10, Baker.") They entered the System "with the understanding and assurance that *if the circumstances suggested it,* the City [of Lincoln] would be able to terminate its social security coverage." (*Ibid.* Ramirez.) (Emphasis added.) In choosing to participate they relied on that assurance.

The Public Agencies became enrolled in the System when the State and the United States modified the federal-state Agreement to include them as a part thereof. (42 U.S.C., 418(c) (4); see also J.A. 31 par. (E) Modification.)[2] They were required by the State's enabling legis-

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cy to terminate is contingent upon approval by "a majority vote of its active covered employees." (See e.g., Application and Agreement of City of Alturas, Docket Entry 11 at page 14 paragraph 8). Accordingly, Resolution No. 82-89 of said City, Requesting termination of Social Security, memorialized the vote of a majority of said employees approving termination. (*Ibid.* at 7).

[2] Each such modification contained terms essentially the same as the following provision of Modification No. 4 to California State Social Security Agreement which incorporated the City of Arcata into the Agreement:

> "The Federal Security Administrator and the State of California acting through its representative designated to administer its responsibilities under the Agreement of March

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lation and by their agreements, to make certain "contributions" to the State as payment for their participation. (California Government Code Section 22551-53). In return for those contributions they received the benefits afforded by the System, together with the assurance that if circumstances warranted, they could withdraw therefrom.

In recent years local governments such as the Public Agencies have been faced with increasing financial problems. Coincidental with these problems came the rapid acceleration of increases in Social Security contributions. These factors combined to cause the Public Agencies to reevaluate their participation in Social Security. (See. Docket Entry 10, Baker, *supra,* pages 3 through 13 and J.A. 64-73). The decision was made by an increasing number of Agencies that "circumstances suggested" that they exercise their bargained for option to terminate that coverage.

"The requests for termination were submitted for several reasons. Prominent among these was the determination by said public entities that the money which they now spend for Social Security coverage could be more effectively used to provide services to taxpayers, and/or to provide benefit programs for their employees." (*Id.* Docket Entry 10, Baker).

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9, 1951, hereby accept as additional coverage groups under said agreement *and acknowledge the full applicability of the original agreement to . . . .*"

(Docket Entry 11, Page 4. Said Docket Entry 11 contains documents relating to the entry and termination of sixteen of the twenty entities which are POSSE Appellees herein.) (Emphasis added.)

Notwithstanding the foregoing, in April 1983 Congress enacted Public Law No. 98-21, Section 103(a) and (b), amending 42 United States Code Section 418(g), to provide that "[n]o agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983." This amendment, which was enacted thirty-two years after the Agreement between the United States and the State of California was entered into, prevented any state from withdrawing coverage for any of its employees, or those of its political subdivisions, even if a termination notice had been filed and was pending at the time Public Law No. 98-21, Section 103(a) and (b) was enacted.

Through April 1983, the State, which had had its Agreement with the Secretary since 1951, had filed termination notices on behalf of approximately 200 of its political subdivisions. However, Public Law No. 98-21 prevented the terminations from taking place in due course.

The effect upon local governments of the repudiation of the option to terminate ranges from substantial to devastating. For example, the City of Alturas reported that foreclosure of the termination option "could lead to elimination of current services." The City of Arcata reported that it "would result in a cutback in maintenance of infrastructure and buildings." Big Bear Municipal Water District reported that "future increases in social security costs would cause cutbacks in community services." (*Id.* Docket Entry 10, Baker, 4 through 10; see also, Affidavits of Alice Harris and Richard Ramirez, J.A. 64-72).

It was in response to this repudiation of the agreed upon termination provision of the 1951 Agreement that

the Public Agencies filed suit in the United States District Court for the Eastern District of California against the United States and the State of California. They sought a declaration that the said amendment violated the Fifth and Tenth Amendments to the United States Constitution, claiming *inter alia*, that their property had been taken without just compensation. They further sought injunctive relief and specific performance of a contractual obligation of the United States to allow the State and the Public Agencies to terminate. It is that right to terminate which constitutes the property right taken by Appellants. (See J.A. pages 7 and 8). Subsequently the State of California also filed suit against the United States. The suits were consolidated by the district court and are consolidated before this Court.

The district court granted summary judgment to the Public Agencies and the State of California. The basis for that judgment is fairly summarized in U.S. Br. at pages 9 through 11.

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SUMMARY OF THE ARGUMENT

1. This case is about the unilateral repudiation by Congress of a substantial provision of a written Agreement to which the United States was a party. The plethora of cases cited by Appellants (hereinafter "the Secretary") tend to obscure that fact. This case is not about contracts between private parties, or between states and private parties, or between states and other governmental entities. It concerns only contractual obligations agreed to and executed by the United States.

2. The Agreement executed pursuant to 42 U.S.C. 418 constitutes a binding contract between the United States on the one hand, and the State of California and the Public Agencies on the other. It has all of the indicia of a contract, including consideration by both parties. "Under any definition of contract, this is a contract." (Dist. Ct. Opinion, J.S. 30a). The Public Agencies became parties to the Agreement through "Modifications" executed by the Secretary and the State. Through this mechanism they were incorporated into the Agreement. Since the Agreement was made for their benefit, they at least were third-party beneficiaries.

Built into the enabling statute and the Agreement is considerable flexibility to allow the parties to adjust to changing conditions. The Congress may change the enabling statute and the Secretary may change the regulations. But Congress intended that the Public Agencies also should be accorded some flexibility. They were given the option to terminate. That *quid pro quo* was a part of the bargain.

The Agreement was entered into voluntarily. California and the Public Agencies *chose* to enroll in the System on specified terms and conditions. One of those conditions was that if circumstances dictated, the State or any Public Agency could withdraw upon two years' written notice. That condition was an integral part of the Agreement and one of the "motivating causes" of Public Agencies' decision to enter the System.

3. The United States is as much bound by its contractual promises as is an individual. *Sinking Fund Cases,*

99 U.S. 700 (1879); *Perry v. United States*, 294 U.S. 330, 352 (1935). Such contracts are to be interpreted according to the law which applies to contracts between private individuals. *Perry, supra.*

The Secretary has advanced an array of conclusions rather than relevant legal arguments and precedents to support his thesis that the United States did not enter into a contract and if it did, it is not bound thereby. None of these can withstand close scrutiny. The conclusion is inescapable that the United States entered into a binding contract with Appellees.

The binding nature of the contract is not altered by a general statutory reservation of power to alter or amend the *statute*. Such a provision does not empower Congress to amend the *contract*. Rather, it is the laws which subsist at the time and place of making the contract which control the contract's operation. Further, to hold that the United States is bound by its contractual obligations does not derogate from its sovereignty. Instead, "the right to make binding obligations is a competence attaching to sovereignty." *Perry v. United States*, 294 U.S. 330, 353 (1935). The United States did not by the 1951 Agreement diminish its sovereign power to legislate regarding Social Security coverage so long as it does so consistent with the Constitution. Neither convenience nor the lessening of expenditures nor the raising of revenues are valid justifications for the Congress to repudiate its contractual obligations.

4. In revoking the termination option Congress breached a substantial provision of the contract. In choosing to enter the System, the Public Agencies relied on

that option. The ability to leave the System if the cost thereof became prohibitive or if continuation became burdensome was a significant enticement to enroll. Further, it was the *quid pro quo* for the flexibility given the Congress and the Secretary to change the statutes and the regulations.

In filing notices of termination Public Agencies acted responsibly after due deliberation and discussion with their employees. It was determined that it was by terminating Social Security that they best could serve their employees and their constituents. To have done otherwise under those circumstances would have been less than responsible.

5. In repudiating the termination option the United States violated both federal common law of contract and the Just Compensation and Due Process Clauses of the Fifth Amendment. Public Agencies have "rights against the United States arising out of a contract with it" either on their own account or as third-party beneficiaries. They were deprived of a valuable contractual right. That right to terminate the Agreement is worth substantial sums to the Public Agencies and is essential to their ability to provide essential services.

6. The United States has repudiated its own contractual obligation. It therefore should be subject to a "heightened standard of review," which should at least be as rigorous as that used in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). It is not enough to show that the impairment is for a public purpose. It also must be "reasonable and necessary" to accomplish that purpose. In enacting the 1983 Amendments Congress sought to mitigate financial losses to the Social Security System result-

ing from termination of coverage by State and local employees. The 1983 Amendments and the legislative history thereof contain numerous examples of other feasible approaches short of the repudiation of contractual obligations of the United States. It follows that the impairment was not "necessary" and was an unconstitutional taking of property.

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ARGUMENT

INTRODUCTION

In maintaining that the United States unilaterally may repudiate its contractual obligations the Secretary attacks a basic principle of American jurisprudence. Simply stated that principle, which is essential to the integrity of our Government, is that the United States is bound by contractual obligations to which it has agreed and which have duly been executed on its behalf.[3] Ramifications of the denial, the circumvention or the evisceration of that principle in cases such as this would be immense. The

[3] The existence of that principle was acknowledged by this Court in *Perry v. United States*, 294 U.S. 330, 351 fn. 2, wherein it quoted with approval these words of Alexander Hamilton:

> "' . . . *when a government enters into a contract* with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the *same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it.*'" (Emphasis added).

element of trust upon which so much of American federalism is based, would be shaken to its foundations.

Beyond the general distrust and frustration which would ensue is the far-reaching economic impact upon the Public Agencies and those similarly situated. That economic impact also has direct ramifications in terms of jobs of the Public Agencies' employees as well as the health, safety and general welfare of the people they serve.[4]

The district court held that, apart from the enabling statute, the Public Agencies have a *contractual* right to withdraw from the System. It held that even if it be assumed *arguendo* that Congress may by statute terminate a *statutory* right to withdraw, it may not abrogate or repudiate its own Agreement executed pursuant to statutory authority. (See, J.S. 31a)

Because this proposition is so clear, simple and undeniable, the Secretary advances an array of conclusions rather than relevant legal authority to support his thesis either that the Agreement is not a contract or that even if it is a contract he is not bound by its terms.

He has generated predictable confusion by liberally infusing into his Brief quotations from and citations to cases dealing with several different types of relationships as

[4] See *Aiffdavits of Alice Harris and Richard Ramirez*, respectively representing the cities of Arcata and Lincoln, California. (J.A. 64-73). For further impacts see *Affidavit of Richard T. Baker, District Court Docket Entry Number 7* dated 8/29/83 pages 3 and 4, and *Affidavit of Richard T. Baker, supra, District Court Docket Entry Number 10* dated 10/17/83, pages 4 through 13. It is clear from the data there presented, which never was challenged or controverted by Appellants, that the financial impact and the impact in terms of the welfare of the people of repudiation of the termination provision is very substantial.

though they virtually are interchangeable. Yet this Court consistently has drawn clear distinctions among them.[5] It bears repeating that this case deals with an express written Agreement to which the United States is a party and to whose terms it freely agreed. This Court consistently has stated that the United States is bound by such contracts. *Perry v. United States,* 294 U.S. 330 (1935); *Lynch v. United States,* 292 U.S. 571 (1934); see also, *National Railroad Passenger Corporation v. Atchison, Topeka & Santa Fe Railway Co.,* No. 83-1492 (Mar. 18, 1985), Slip Opinion 15 and 20 fn. 24.

I

APPELLANTS UNILATERALLY HAVE REPUDIATED THEIR CONTRACTUAL OBLIGATIONS THEREBY DEPRIVING APPELLEES OF THEIR CONTRACTUAL RIGHTS

A. THE UNITED STATES HAS ENTERED INTO A BINDING CONTRACT WITH THE PUBLIC AGENCIES

The Secretary first contends that there is no contract at all. He vaguely refers to a "contractual aspect" which is "unlike normal contractual undertakings." (U.S. Br. pages 11, 12, 18.)

Yet the document which forged his relationship with the State and the Public Agencies is captioned "Agreement." It begins with the words "THIS AGREEMENT

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[5] The referenced types of relationships are discussed in Public Agencies' Motion to Dismiss or Affirm 6 and 7. In *National Railroad Passenger Corp. v. A.T.&S.F.R.* No. 83-1492, Slip Opinion 14 through 18, this Court gave an illuminating description of the distinction between a "statutory contract" which would "constitute a binding obligation of Congress" and a "regulatory policy" set forth in a statute.

entered into this 9th day of March, 1951 . . . ." It identifies the United States of America as "party of the first part" and the State of California as "party of the second part." It recites the fact that "the parties hereto . . . agree" to certain "terms and conditions."

The Agreement further sets forth mutual covenants, obligations and benefits of both the original parties thereto and employees of political subdivisions of the State.[6] Mutual consideration clearly is evident. Provisions for incorporation of additional parties and/or beneficiaries appear, as do provisions for termination of the Agreement *by either party.* Authorized signatures show that the document was duly executed. (J.A. 29 *et seq.*) The terms are clear and unambiguous.

This Agreement was authorized by Congress in 42 U.S.C. 418. That section provides for the execution of an agreement on behalf of the United States. That a *written* agreement was contemplated is clear. It follows that "the case for an obligation binding upon" the United States also "is clear." *National R. Passenger Corp. v. A.T.&S.F.R., supra,* at 15, citing *Dodge v. Board of Education,* 302 U.S. 74, 78 (1937).

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[6] In an oblique reference to their Jurisdictional Statement at U.S. Br. 17 fn. 15, the Secretary again asserts that POSSE Plaintiffs were not properly before the district court. The contentions raised at J.S. 9-10 fn. 9 were answered in Public Agencies' Motion to Dismiss or Affirm 15-16. The standing issue was exhaustively briefed and argued in the district court. It further was discussed in detail in the district court's opinion. See J.S. 11a through 22a. In that opinion the district court referred to its discussion of the question of standing in the case of *Sierra Club v. Watt,* 608 F. Supp. 313 (E.D. Cal. April 18, 1985). The foregoing analyses clearly demonstrate that POSSE Plaintiffs were in fact properly before the district court.

Much of what appears in the Agreement expressly was set forth also in Section 418. Clearly set forth at 418(g) was the provision for termination. Its terms were consistent with the termination provisions which were placed into the Agreement. Congress built considerable flexibility into Section 418. For example, Sec. 418(e) provides that the State shall comply with specified types of regulations promulgated by the Secretary. That statutory provision also is reflected in the Agreement. Congress reserved to itself the power to amend the statute. The obvious *quid pro quo* for that grant of discretion to the Secretary and the Congress is the Public Agencies' option to terminate.

It is clear that the enacting Congress intended that there should be flexibility in the administration of the Act. It intended also that State and Local governments should have the flexibility to withdraw if they felt the circumstances warranted it. Without that flexibility the Public Agencies clearly would have struck an "inequitable bargain."

Given that background it is impossible to rationalize the Secretary's bland assertions that "Congress did not intend to create contractual rights" and that "Section 418 agreements have none of the indicia of typical contracts." (U.S. Br. 20 and 22.) To the contrary, this Agreement as well as the enabling statute evidence a clear intent by Congress and the Secretary to enter into a binding contract with the State and the Public Agencies. In the words of the district court, "under any definition of contract, this is a contract. (cases cited)." (J.S. 30a). The suggestion to the contrary is preposterous.

B. APPELLANTS ARE OBLIGATED UNDER THE CONTRACT TO PERFORM ACCORDING TO ITS TERMS, WHICH INCLUDE THE PUBLIC AGENCIES' RIGHT TO TERMINATE

This Court repeatedly has affirmed the obligation of the United States to meet its contractual commitments. "The United States are as much bound by their contracts as are individuals." *Sinking Fund Cases*, 99 U.S. 700, 718, 719 (1878). "If they repudiate their obligations, it is as much a repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." *Id.* Quoted in *Perry v. United States, supra* at 350, 351. See also *Lynch, supra* at 576, 577. "When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments." *Perry, supra*, at 352. See also the quotation from Alexander Hamilton, *supra*, at fn. 3 of this Brief.

Notwithstanding these clear statements which never have been repudiated, the Secretary claims that he is not bound by his contractual obligation to honor the Public Agencies' termination notice. The conclusions he advances to support his thesis are varied. Responses to these will appear in the discussion which follows.

1. The Agreement is a contract which is binding upon the United States.

The Secretary argues that Section 418 Agreements merely are a "method of federal regulation" with a "contractual aspect" but that they "cannot be viewed in the

same manner as a bilateral contract governing a discrete transaction." Citing *Bennett v. Kentucky Department of Education* (hereafter *"Kentucky"*), 105 S.Ct. 1544, 1552 (1985). (U.S. Br. 18, 19.) He attempts to force Section 418 Agreements into the mold of the federal grants this Court discussed in *Kentucky* and similar cases. He takes out of context the quoted language from *Kentucky* to support his contention that the Agreement is not a contract. But he fails to point out that that case dealt with a *federal grant program* through which federal funds were administered through the states. That process is an inversion of that of the Social Security System in which the State collects funds from its constituents to be funneled to the federal government. It is clear then that the Secretary's suggestion that Section 418 Agreements are "cooperative federal-state" programs effectuating a "regulatory policy" such as those created and administered under the Food Stamp Act and other similar programs misconceives the nature of such agreements (See U.S. Br. 18 and 19). The only "cooperation" here involved is that the State collects money for the federal government. It acts merely as a conduit. The funds are administered by the United States, which has sole discretion over how and where they are to be spent. This distinction is critical and is fatal to the Secretary's analysis.

In any case, as the ensuing discussion will show, the language in *Kentucky, supra*, when viewed in context with *Bennett v. New Jersey* (hereafter *"New Jersey"*), 105 S.Ct. 1555 (1985) and *Bell v. New Jersey and Pennsylvania* (hereafter *"Bell"*), 461 U.S. 773 (1983) supports the Public Agencies' contentions rather than those of the Secretary. But the common thread in those cases is the question of compliance by States with terms agreed to

by them as a condition of obtaining federal grants. They did *not* deal with the facts before this Court—a written contract executed by the United States.

Independent of written contracts such as the one under discussion, this Court has drawn a clear distinction between statutory *contracts* on the one hand and statutes which set forth *"mere regulatory policy"* on the other. Of first importance is an examination of the statute's language. "If it provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear." *National R. Passenger, supra* at 15. Inferentially, in such a situation, the *Social Security Act* would be binding independent of the Agreement. Here the Court need not go that far. Not only does Section 418 provide for the execution of a written contract, but a written agreement was in fact executed on behalf of the United States. It is from that written Agreement that the Public Agencies obtain their contractual rights. In that circumstance the case for an obligation binding upon the United States is more than compelling. It is overwhelming.

2. The binding nature of the Contract is not altered by 42 U.S.C. Section 1304, which authorized Congress to amend the enabling statute.

The Secretary contends that 42 U.S.C. Sec. 1304 gives him license to alter or amend the Act even if such alterations and/or amendments result in the repudiation of significant terms of the Agreement. (U.S. Br. 20.) As cogently observed by the district court, "From this language, the defendants appear to argue that there was no contract for them to breach." It has been demonstrated

that there *is* a contract which binds the United States and the Public Agencies. That contract is memorialized in a written Agreement. While the Agreement is authorized by statute it exists independently thereof. "Section 1304 does not authorize the Congress to alter or amend the *contract;* it only authorizes the Congress to alter or amend the *statute.*" (District Court Decision J.S. 30a through 32c.) "The state's right to terminate draws its independent existence from the plain terms of the contract it executed with the United States." *Id.*

In the *Sinking Fund Cases, supra,* this Court considered a similar reservation of power. Mr. Chief Justice Waite held that while under such a reservation of power Congress may retain the power to amend the original charter (in this case the enabling statute), "[i]n so doing it cannot undo what has already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future . . . ." *Id.* at 721. The logic behind that statement is compelling. The United States has executed a contract. It cannot now by direct legislation undo its obligation thereunder.

3. The laws which subsist at the time and place of making a contract control its operation.

In a related argument of classic "bootstrap" vintage, the Secretary argues that since the Agreement provides at Section 418(a)(1) that "federal-state agreements may not contain provisions that are 'inconsistent with the provisions of this section'," all that needs to be done to negate the termination provision of the Agreement is to delete that provision from the statute and to substitute a provision which precludes termination. (U.S. Br. 24.)

To contend as does the Secretary that Sections 1304 and 418(a)(1) are "self destruct" clauses giving Congress the right to change contracts as well as statutes is "absurd." That word was used by this Court to describe a similar proposition in *Murray v. Charleston,* 96 U.S. 432 at 445 (1877): "A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." (Cited with approval in *United States Trust Co. v. New Jersey,* 431 U.S. 1, at 24 fn. 22 (1977).)

This Court repeatedly has held that "The laws which subsist at the time and place of the making of a contract" rather than amendments to the laws enacted after the contract's execution, control its interpretation. *Home Building & Loan Assn. v. Blaisdell,* 290 U.S. 398, 429-430 (1934), quoted with approval in *United States Trust, supra,* at 20 and 22. See also *Kentucky, supra* at 105 S.Ct. 1553 (1985) and *New Jersey, supra* at 105 S.Ct. 1556 (1985) " . . . obligations generally should be determined by reference to the law in effect when the grants were made."

That position makes eminent sense. "To say that Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise; a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our government." *Perry v. United States, supra* at 351. Quoted with approval in *National RR Passenger, supra,* at 20 fn. 24.

Neither the Public Agencies nor the district court dispute Appellants' contention that it is "black letter law that contracts must be deemed to incorporate the terms

of relevant statutes." (U.S. Br. 25.) The key to that proposition is the word *"relevant."* Only those statutes which "subsist at the time and place of making the contract" are *relevant*. *Amended* Section 418 did *not* subsist at the time the Agreement was negotiated or executed. Nor did it exist for more than a quarter of a century thereafter. Clearly it is not *"relevant"*.

4. To hold that the United States is bound by its contractual obligations does not derogate from its sovereignty.

The Secretary contends that binding the United States to its contractual commitments would impair its "sovereign power."[7] The contention takes several forms which span pages 25 through 42 of U.S. Brief. They evidence a basic misunderstanding of the district court's opinion. The misunderstanding is most clearly articulated at page 32 of said Brief wherein they make the astounding statement that "[i]f the court below meant to hold that Section

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[7] A similar contention was made in *Perry* v. *United States, supra* at 353 and 354. This Court's reply was as follows:

> *"The argument in favor of the Joint Resolution, as applied to government bonds, is in substance that the government cannot by contract restrict the exercise of a sovereign power. But the right to make binding obligations is a competence attaching to sovereignty.* In the United States, sovereignty resides in the people who act through the organs established by the Constitution. (Cases cited). The Congress as the instrumentality of sovereignty is endowed with certain powers to be exerted on behalf of the people in the manner and with the effect the Constitution ordains. The Congress cannot invoke the sovereign power of the people to override their will as thus declared." (Emphasis added.)

See also, fn. 2 hereof wherein appear the words of Alexander Hamilton quoted with approval in *Perry, supra* at 351 fn. 2.

418 agreements must be construed in a way that would prevent Congress from making essential modifications in the Social Security System," its decision cannot be reconciled with this Court's decisions that "federal and state 'governmental powers cannot be contracted away' ".

There could be no more patent mischaracterization of the district court's holding. That court repeatedly stated that it dealt with abrogation of *contractual* provisions rather than with the power of Congress to make "essential modifications" in the enabling statute.

North American Commercial Co. v. United States, 171 U.S. 110, 137 (1898), cited by the Secretary at U.S. Br. 32 to support his sweeping conclusion that "federal and state 'governmental powers cannot be contracted away' " is inapposite. Unlike the case at bar, the agreement in that case was a "lease" granting an exclusive right to *North American* to hunt seals in a specified location. The "lease" was silent regarding restrictions on numbers of seals to be taken except that it provided that *North American* "agrees to obey and abide by any restrictions or limitations upon the right to kill seals that the Secretary of the Treasury shall judge necessary . . . ." When the Secretary placed a limit on the number of seals to be taken in 1893, *North American* refused to pay its rent, claiming that it had been deprived of the fancied right to take unlimited numbers of seals. There was in fact no such right either written or implied. In fact, the above quoted provision stated precisely the reverse. By contrast, the Agreement in the case at bar contained an express written provision for termination of Social Security by the State or the Public Agencies.

Speaking for this Court Mr. Justice Cardozo asserted that "sovereigns may contract without derogating from their sovereignty." *Steward Machine Co. v. Davis,* 301 U.S. 548, 597 (1937) citing *Perry, supra* at 353. In a different context, but also relevant to the case at bar, this Court said that to require "States to honor the obligations voluntarily assumed as a condition of federal funding . . . simply does not intrude on their sovereignty." *Bell v. New Jersey and Pennsylvania,* 461 U.S. 773, 790 (1983). That case emphasized the free choice exercised by the states pursuant to *statutes. There was no written agreement* as in the case at bar. There were nothing more than statutory conditions which attached to the obtaining of federal funding.

In the case at bar the United States "voluntarily assumed as a condition" of the entry by California and the Public Agencies into the System, their right to terminate the Agreement. The United States "freely gave its assurances that it would abide by the conditions" of its contract. See, *Bell, supra* at 790.

Again it must be emphasized that holding the United States to its bargain cannot be construed to mean that it is "bound never to depart from the terms of the Section 418 *program* as they were established in 1950." (See U.S. Br. 24-25.) (Emphasis supplied) The United States is free, within constitutional restraints, to change the "program" by amending the statute. What it may *not* do is abrogate contractual terms to which it already has agreed in writing.

The Secretary strongly urges that Congress could have swept *everyone* into the System, with the result that

the Agreement would have been rendered nugatory anyway. That being the case, so the argument goes, the *methods* used by Congress should not be questioned. What Appellants really seek is a ruling that "the end justifies the means." In this case the "means" contended for are those which at the moment appeared to be the most *convenient* of the numerous options available to them regardless of ethical and constitutional considerations. There may be societies in which such an approach is acceptable. But it does not fit into our constitutional and ethical system.

Of course that question (whether Congress could have required mandatory universal coverage) is not before the Court. A determination of the constitutionality of such legislation must await the attempt.

The inconsistency of the Secretary's arguments also is elsewhere apparent. On the one hand he argues that binding him to this contract would immobilize future Congresses presumably even from constitutionally defensible changes in the System. Yet he argues also that Congress *could* have changed the System in a manner consistent with the Constitution. He can't have it both ways. In fact Congress is not immobilized. It has latitude to do whatever is lawful and constitutional.

5. Neither convenience nor the lessening of expenditures nor the raising of revenues are valid justifications for the Congress to repudiate its contractual obligations.

The foregoing would appear to be self-evident. Yet the Secretary argues that because Congress found it "most efficacious" to reach its goal by repudiating its contractual obligations it is permissible to do so. The argument

appears to be one of *convenience.* (See, U.S. Br. 32, 33) This Court addressed that issue in *Perry, supra* at 350-351. It concluded that the United States is not free to repudiate its obligations simply because a later Congress finds "their fulfillment inconvenient."

Perry also addressed the question of whether the need to reduce expenditures would justify repudiation of a contractual right. It should be recalled that *Perry* was decided in 1935, at the height of the Great Depression. (*Lynch, supra,* was decided in 1934.) The social and economic environment was so desperate as to make the Social Security "crisis" of 1983 pale into insignificance. Notwithstanding the extremity of that situation, this Court held that the United States is bound by its contractual obligations (at 350 to 354).

In *Lynch,* Mr. Justice Brandeis duly noted the problems created by the Depression. Yet he affirmed that Congress "is without power to reduce expenditures by abrogating contractual obligations of the United States." To do so would be "not the practice of economy, but an act of repudiation . . . ." (at 580). The *raising* of revenues, which was the main reason for the enactment of the 1983 Amendments, also does not justify the abrogation of contractual obligations of the United States by the United States.

The foregoing is consistent with the principle enunciated long ago in the *Sinking Fund Cases, supra,* that the United States "are as much bound by their contracts as are individuals." (99 U.S. at 719) That principle was affirmed by Mr. Justice Brandeis in *Lynch, supra:* "When the United States enters into contract relations, its rights

and duties therein are governed generally by the law applicable to contracts between private individuals." (292 U.S. at 579) Accord, *Perry, supra* at 352 and *S.R.A. Inc. v. Minnesota,* 327 U.S. 558, 564 (1946). (For a cogent analysis of the application of federal common law of contracts to the case at bar please see *Amici Br.* Arguments I and II.)

It is clear that had the termination provision under discussion been between individuals no principle of contract law would have justified the unilateral repudiation thereof by one of them. Yet the Secretary contends that because the United States is a sovereign the principles governing contracts do not apply. It has been demonstrated that "sovereigns may contract without derogating from their sovereignty." *Steward Machine Co., supra* at 597.

The Secretary attempts to avoid the holdings of *Perry* and *Lynch* by arguing that the facts in those cases dealt with an entry by the state into "financial and other markets." (U.S. Br. 36 citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 412-413 n. 14 (1983) and *United States Trust Co. v. New Jersey, supra* at 25 (1976).) The implication is that these cases hold that *only* where the United States enters "financial and other markets" is it bound by its contractual obligations. This Court never has so held.

But even were one to assume *arguendo* that entry by the United States into "financial and other markets," and "investment-backed expectations" (U.S. Br. 18) are prerequisites to binding the United States to its contractual obligations, the Secretary could not prevail. A primary

reason for the exodus of increasing numbers of Section 418 employees from the System was that coverage could be provided elsewhere less expensively. (See, Dist. Ct. Docket Entry 10 at page 3). The System is competing in the marketplace not only with State pension plans but also with private enterprise. It is no secret that the insurance "market" is very large and that the competition is keen. That it qualifies as a "financial or other market" is beyond reasonable dispute.

Further, the State and the Public Agenies do in fact have "investment-backed expectations" of substantial proportions in their own pension programs. The PERS of California is one example. As costs of government increase and available financial resources decline, the burden of paying for two pension programs already has become intolerable for Public Agencies.

It must be emphasized that the Public Agencies submit the foregoing analysis regarding "business purposes" and "markets" and "investment" *arguendo* only. They do ***not*** thereby in the least concede that only in those circumstances may the United States be held to its bargain.

It is asserted also that *Lynch, supra,* stands ***only*** for the proposition that "need for money is no excuse for repudiating contractual obligations." (U.S. Br. 37) (Emphasis added). That that conclusion is not factual is demonstrable.

While the quoted words, which are taken from *United States Trust, supra* at 26 n. 25, arguably express the narrowest possible "holding" of that case, *Lynch* "stands for" much more.

For example, in *Lynch,* this Court expressly rejected the notion embodied in the aforementioned argument that contracts "not entered into by the United States for a business purpose" were entitled to be treated differently than those which are. To the contrary, the Court said: "[b]ut the [war risk] policies, although not entered into for gain, are legal obligations of the same dignity as other contracts of the United States and possess the same legal incidents." (*Lynch, supra* at 576). That principle has direct application to the case at bar.

Lynch was concerned with insurance in the form of War Risk Insurance policies which were held to constitute contracts obligating the United States. "As consideration for the government's obligation, the insured paid prescribed monthly premiums." *Lynch, supra* at 576. Here also we are concerned with insurance. The Secretary calls it the "Nation's basic social insurance program." (U.S. Br. 17). The insureds pay a prescribed premium to their employers, also "as consideration for the government's obligation." The basis for their involvement is the agreements which have been discussed. As in *Lynch,* the terms of these agreements are contractual obligations. That includes the obligation of the United States to allow the Public Agencies to terminate their coverage under the Act.

In *Lynch* Congress had sought to relieve the financial burdens of the Depression by renouncing its obligations under the War Risk policies. In this case it sought to relieve the financial concerns of the Social Security System by among other measures renouncing its contractual obligations with the State and the Public Agencies.

Notwithstanding the Secretary's protests that there were other "concerns," the overwhelming reason for pas-

sage of the 1983 Amendments, which included the repudiation of the termination option, was the perception of a financial crisis. Hence the title by which it commonly was known, the Social Security "Rescue" Bill. Even under the narrowest holding of *Lynch, supra,* the repudiation of the termination option was improper. And yet the "crisis" facing the System in 1983 was minor when compared to the overwhelming financial challenges of the Great Depression during which *Lynch* and *Perry* were decided.

6. In revoking the termination option Appellants have breached a substantial provision of their contract with the Public Agencies.

The Secretary does not dispute that the Public Agencies complied with the prerequisites for termination. That they did so is clear from the district court record. (See, e.g., Docket Entry 10, Baker, *supra,* together with Exhibit B thereto consisting of seven pages incorporating a letter and other documents from the City of Arcata.) All of the prerequisites were filled. The district court so found.

It has been shown that the termination option was a substantial factor in enticing the Public Agenies to enter the System. (See, *Statement, supra,* and Declarations of Richard Ramirez, J.A. 64 through 67 and Richard T. Baker, cited therein.) The obvious reason for the "escape clause" was that it might someday need to be used. Its need would be dictated by the exigencies of the times. "The City of Lincoln entered the Social Security program with the understanding and assurance that if the circumstances suggested it, the City would be able to terminate . . . ." (J.A. 72 par. 13). One of those "circumstances" actually occurred: a lack of sufficient funds to

keep employees in two or more retirement systems and still perform essential services. (J.A. 64 through 73).

It is anomalous indeed that the occurrence of the very contingency the "escape clause" was intended to protect the Public Agencies against, has been used as a sword to separate them from their bargained for shield.

The fact is that the System is substantially more expensive today than it was when the Public Agencies became involved. And it promises to become even more so. It is this rapid escalation of costs to support the System which has motivated them to seek more competitive ways of providing coverage for their employees. For many local governments the choice is between that and financial disaster. The termination option was calculated to save them from such a fate. Clearly it was a substantial enticement to enter the System.

Far from irresponsibly depriving their employees of insurance coverage as the Secretary suggests, many if not most California local government entities have carried double coverage. (See, e.g., J.A. 72—Ramirez, par. 15). In making the choice to terminate Social Security they have deliberated extensively and consulted with their affected employees. The choice to terminate was made as the option which best would serve both their employees and their constituency.

From the foregoing it is clear that the United States entered into a contractual relationship with the Public Agencies and that it breached a substantial provision of that contract to the Public Agencies' detriment. That alone should suffice to affirm the district court's judgment.

II

THE REPUDIATION OF THE TERMINATION OPTION BY THE UNITED STATES CONSTITUTED A TAKING OF PROPERTY WITHOUT JUST COMPENSATION WITHIN THE MEANING OF THE FIFTH AMENDMENT

The Just Compensation Clause provides that "private property" may not be taken for a public purpose without just compensation. (U.S. Constitution Amendment 5). The district court held that a "California *public* agency (a political subdivision of the State) may possess 'private property' within the meaning of the Just Compensation Clause." Citing *United States v. 50 Acres,* 105 S.Ct. 451, 456 (1984). (J.S. 16a and 17a).

It is clear that the Public Agencies are "persons" within the meaning of the Fifth and Fourteenth Amendments. *Township of River Vale v. Town of Orangetown,* 403 F 2d 684 at 686 (2nd Cir. 1968); *City of Boston v. Massachusetts Port Authority,* 444 F 2d 167 at 168 (1st Cir. 1971); *Owen v. City of Independence, Mo.,* 445 U.S. 622 at 639, 100 S.Ct. 1398 at 1409 (1980); see also, *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 at 687 (1978); *City of Santa Clara, Cal. v. Andrus,* 572 F 2d 660 at 675 (9th Cir. 1978); *Housing Authority of City of Asbury Park v. Richardson,* 346 F. Supp. 1027 at 1032 (1972).

Because they are "persons" they may assert constitutional claims. The district court so held.

The district court held also that "[A]s a general rule, rights which arise out of contracts with the United States are 'property' within the meaning of the Fifth Amendment." (J.S. 19a). In so holding it quoted from *Lynch, supra* at 579 as follows:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. *Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.*" (Emphasis added).

(See also, *United States v. Petty Motor Company,* 327 U.S. 372, 374 (1945); *Armstrong v. United States,* 364 U.S. 40, 42-46 (1960)).

The Public Agencies have "rights against the United States arising out of a contract with it" either on their own account or as third-party beneficiaries. By its own terms the federal-state Agreement was to "*include* political subdivisions or coverage groups" which were added through "modifications" to the Agreement. (J.A. 31 par. (E) Modification). They thereby became a part of the Agreement and have the right to enforce its terms on their own account.

Even if it were assumed that the Public Agencies do not have such rights on their own account, they do have them as third-party beneficiaries. That the Agreement entered into was for their benefit is beyond dispute. (See district court analysis on this issue at J.S. 20a through 22a. See also, *Regulations to Section 218 of the Act,* Section 404.1201 General effect of Section 218 of the Act: State and Federal Governments to enter into Agreement "for the purpose of extending to certain employees of the State and its political subdivisions protection accorded other employees. . . ." (Title 20 CFR Sec. 404.1201(a)). Accordingly, the Public Agencies have rights arising out of the contract with the United States.

While the Secretary seems to concede that the contract was "impaired," he argues that this impairment is not of "constitutional dimension," that the "destruction of one strand of the bundle" of property rights is not a taking. (U.S. Br. 42.) He argues further that the "economic impact" of the repudiation of his contractual obligation is minimal and that to affirm the district court "would permit persons to 'remove their transactions from the reach of dominant constitutional power by making contracts about them.' " (U.S. Br. 43).

In advancing those arguments the Secretary ignores the central facts of this case: that the "dominant constitutional power" to which the Secretary refers is *Congress;* that *Congress* enacted the legislation which authorized the United States to execute the Agreement containing a termination option; and that *pursuant to said Congressional authority the United States executed the Agreement and is one of its parties thereto.* That legislation with its resulting Agreement was the mechanism through which *Congress* adjusted "the benefits and burdens of economic life." It must be emphasized that *none* of the cases cited by the Secretary to support his arguments on these issues deal with facts such as those of this case.

The "bundle" of property rights in dispute is not the Agreement as a whole. Rather, the termination option is the *entire* "bundle". And it has been repudiated by Congress in its entirety. It was not modified. It was abrogated. There are no "strands" left. The argument that Appellees have lost only one "strand" of their "bundle" of rights because they still have the rest of an Agreement which they want to terminate is absurd. The destruction

of the right to terminate of necessity effectively destroyed the value to the Public Agencies of the entire agreement.[8]

Some "values" inherent in the termination option already have been discussed. It should not be overlooked that the economic impact on the states and public agencies of repudiation of that option is very substantial. As cogently pointed out in *Amici Br.* Argument, par. II, "California—and other contracting States—must under the 1983 Amendments continue to pay large sums of money for coverage of employees of political subdivisions which no longer desire such coverage. . . . By any measure, such an effect is hardly *de minimus.*" Far from being *de minimus,*

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[8] In the closing paragraphs of his Brief (See, U.S. Br. 43 through 45) the Secretary advances several arguments of such marginal if any relevance that they require no comment except to acknowledge that they exist. A typical example is his suggestion that "any expectation on the part of appellees that they would never be required to participate in Social Security against their will cannot be deemed reasonable." Citing *Ruckelshaus v. Monsanto Co.*, No. 83-196 (June 26, 1984) slip op. 17 and *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 161 (1980).

The portion of the cited cases referred to is the restatement of the principle that "a mere unilateral expectation or an abstract need is not a property interest entitled to protection." *Webb, supra,* at 161. As with so many of the Secretary's arguments, the suggestion sets up a straw man. There has been no discussion on the part of anyone of any expectation that Social Security never would become mandatory, although such an expectation at the time the agreements were executed clearly would have been reasonable. That question is not at issue. Its insertion confuses rather than illuminates. The question in this case deals with a contractual obligation of the United States freely negotiated and entered into. Surely the inclusion of that provision in the contract raised a *bilateral* understanding if not an expectation that the option to terminate someday might be exercised. It therefore is obvious that the principle for which the Secretary cites *Monsanto, supra* and *Webb, supra* does not apply to the facts of this case. A similar conclusion applies to all of these marginal arguments advanced by the Secretary.

the financial impact on the Public Agencies independent of that on the State is in some cases devastating. (See, J.A. 64 through 73 and District Court Docket Entry 7 and 10, Baker Affidavits). And the impact on the State and its political subdivisions in the aggregate is enormous. Clearly, valuable contract rights belonging to the Public Agencies have been expunged by the 1983 Amendments.

III

IN SCRUTINIZING THE GOVERNMENT'S REPUDIATION OF ITS OWN CONTRACTS FOR APPLICATION OF THE JUST COMPENSATION CLAUSE, "A HEIGHTENED STANDARD OF REVIEW" SHOULD APPLY

The "standard" of review proposed by the Secretary is in fact a non-standard calculated to give the United States license to abrogate contractual commitments at will. This Court has observed that there is a "clear distinction between the power of Congress to control" or interdict the contracts of private parties when they interfere with the exercise of constitutional authority, and the power of Congress to alter or repudiate the substance of its own engagements. . . ." *Perry, supra,* 350-351, cited in *National RR Passenger, supra,* 20 n. 24. In *National RR Passenger, supra,* the Court suggested that in cases such as this, a "heightened standard of review" apply.

"An appropriate standard," suggest *Amici* in their Brief, "is found in *United States Trust Co.*" (*Amici Br.*, Argument III). *United States Trust Co., supra,* was decided in the context of a *state's* breach of its contractual obligations. Public Agencies submit that the federal government should be required to pass a test at least as stringent as the one there set forth. This Court there held

that it could sustain the State's repudiation of its contractual obligations only if the "impairment was both *reasonable and necessary* to serve the admittedly important purposes claimed by the State." *Ibid.* at 29. (Emphasis added). It concluded that the burden is on the government to show that "an evident and more moderate course would [not] serve it's purposes equally well." (*Id.* at 31).[9]

Under either prong the 1983 Amendments must fail. The Secretary contends that "Congress plainly acted rationally in distinguishing between state and local government employees who currently are participants in the System and those who do not. Expanding coverage to workers outside Social Security would mean displacing existing pension systems . . . and would impose double burdens on states or localities that currently operate 'pay as-you-go pension plans. . . .' " The speciousness of that argument is apparent from the fact that the 1983 Amendments swept into the System employees of all nonprofit organizations without regard to whether some of them had existing plans in place.

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[9] In a brief concurring opinion Mr. Chief Justice Burger stated his understanding of the holding as follows:

> " . . . the State must demonstrate that the impairment was essential to the achievement of an important state purpose. Furthermore, the State must show that it *did not know and could not have known the impact* of the contract on that state interest at the time the contract was made." (*Id.* at 32). (Emphasis added).

Clearly the United States knew or could have known at the time the contract was executed that Public Agencies would exercise their option to terminate in the appropriate circumstances. They further knew or could have known that the exercise of that option by Public Agencies and others would diminish contributions to the System and might ultimately become a cause for financial concern.

That there were other available options short of the drastic one of repudiating contractual obligations is clear. For example, with regard to *federal* employees, only ***new*** employees were required to join the System. (Pub. L. No. 98-21, Sec. 191, 97 Stat. 67.) Yet *all* nonprofit employees were required to enroll. (*Id.*, Sec. 102(a) (1), 97 Stat. 70.) And the Secretary contends that Congress *could* have included all State and Local employees. He suggests that it pursued the challenged course because it was "most efficacious" and describe it as a mere "semantic defect" which has no "independent constitutional significance." (U.S. Br. 32). None of those euphemisms qualify the repudiation of the termination provision as "reasonable and necessary." To the contrary, they are a clear admission that the repudiation was neither reasonable nor necessary.

The foregoing options are only some of those that could have been adopted. It is obvious that it was not necessary for the Congress to repudiate its contractual obligations. As was incisively observed in the *Amici Br.*, Argument III:

> "The fact that Congress could have reached the same end through permissible means hardly serves, as the Secretary suggests, to render 'absurd' the argument that the Government's repudiation of its contracts is constitutionally impermissible. (U.S. Br. at 13.) The Fifth Amendment—as much of the Constitution—is largely about *process*, not results. It is permissible to deprive a person of life, liberty or property, the Constitution teaches, only after due process of law. Just as it is no answer to a valid Fifth Amendment claim in the criminal context to say that a fair trial would surely have produced the same result, it is no answer in this case for the Secretary to contend that a different legislative approach might constitutionally lead to the same practical result. Indeed, since it is plain

> that it was not necessary for Congress to repudiate the 1951 Agreement in order to avoid financial loss to the System, its decision nonetheless to abrogate its agreements with the States is wholly indefensible."

CONCLUSION

This Court repeatedly has asserted that *States* are bound to honor their contractual obligations to the United States. See, e.g., *Bell, supra;* and *Pennhurst State Hospital v. Halderman,* 451 U.S. 1 at 17 (1981). That the United States in turn is bound to honor its contractual commitments to the State and the Public Agencies is central to our federal system and is consistent with principles of justice and fairness. If the United States may abrogate its solemn promises made to the State and the Public Agencies in a written agreement, then "federalism" indeed is an empty word. Further, the legitimate expectations of parties to contracts would go unfulfilled.

A contract contemplates mutual benefits and obligations. The very concept of contract belies the notion that one of the parties, even if it perceives itself as being more powerful than the other, unilaterally may change the contract's terms. Here two sovereign entities have by written contract made pledges to each other. In reliance on these pledges one of these sovereigns has made similar pledges to yet other parties which are an integral part of our federal system. The other sovereign (United States) expressly and in writing has extended its pledges to encompass those other parties. And those other parties also made commitments in reliance on the pledges of the United States.

But more than federalism and the sanctity of contract are at stake. If the government of the United States is free at its convenience to ignore its solemn contractual commitments the erosion of confidence of average Americans in their government surely will be immense. Particularly is this true where, as seems to have been the case with the 1983 Amendments, the elected representatives of the people are not free to work their will on the legislation before its enactment.[10]

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[10] There is evidence that the process by which the 1983 Amendments became law itself was flawed and may well have circumvented the political safeguards of federalism contemplated by the Constitution. Among the factors which lend support to that conclusion are the following excerpts from statements made by two Congressmen who protested the "gag rule" which the House leadership had imposed upon them.

Congressman Gonzalez explained that he could not support a bill "that is drawn up in a matter of days, when we know that the recommendations behind it were arrived at after months of struggle, and then only after the Commission was force-fed. The issues . . . are immense. They deserve more careful consideration than we are permitted to give today . . ."

And Congressman Addabbo noted that the Social Security bill "may be the most critical piece of legislation to come before this Congress this session . . . This entire charade has been a political blitzkrieg in which those of us who have raised questions about the validity of what we are doing and the extent of harm we are causing innocent people have been brushed aside in the rush to bring this bill to the floor before reason can assert itself." (See, Cong. Record, House, March 9, 1983, H 951, 1004-1005).

The highly unusual process through which the Bill became law would seem to dictate that less deference than usual be paid to this legislative enactment and greater than ordinary scrutiny be exercised by the Court.

Honoring of pledges builds reliance and trust and stability in relationships among individuals and sovereigns. That trust is the oil which keeps the machinery that is society running if not always smoothly, at least running.

The repudiation of pledges, on the other hand, leads inexorably to frustration and distrust and instability. With the oil gone the resulting friction can lead only to a breakdown of the machinery. The Secretary has given no valid reason why he should be given license to abandon his pledges. The people of the United States and the several states would be ill served were he allowed to do so.

The judgment of the district court should be affirmed.

Respectfully submitted,

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Public Agencies Opposed to
Social Security Entrapment, et al.

March 1986

(9)

No. 85-521

In the Supreme Court of the United States

OCTOBER TERM, 1985

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v.

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

STATE OF CALIFORNIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANTS

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REPLY BRIEF FOR THE APPELLANTS

Because appellees either misstate or misunderstand our arguments, our basic submission bears restating. In our view, the district court erred for several independent reasons in holding that California's Section 418 agreement is property that was "taken" by the 1983 amendment. The court was mistaken, at the outset, in holding that Section 418 agreements are enforceable in the same manner as ordinary commercial contracts (see Gov't Br. 17-23). The court also failed to recognize that – even if Section 418 agreements do create vested rights – those rights were not disturbed when Congress exercised its reserved prerogative to enroll the states in the Social Security System (Gov't Br. 23-32); if vested rights were disturbed, moreover, the congressional action did not rise to the level of a taking (Gov't

Br. 42-45). And the court did not take note of the principle that Congress's authority to legislate for the public welfare cannot be contracted away (Gov't Br. 32-41). Appellees' responses to these points will be discussed in turn.

1. Appellees' principal contention appears to be that California's Section 418 agreement looks so much like a contract that it must be one (POSSE Br. 14-18; California Br. 11-13, 16-20; Council of State Governments (CSG) Amici Br. 13-16). In reaching this conclusion, appellees point to a number of factors: that the agreement was reduced to writing, and was signed by representatives of the state and federal governments; that the mutual undertakings described by the agreement were supported by "consideration"; that the agreement was entered into voluntarily;[1] and that California specifically bargained for inclusion in the agreement of a termination provision. Whether appellees have described these factors accurately may be questioned.[2] But even granting appellees' assertion that the Section 418 agreement resembles a contract, the legal import of that document is considerably less than the sum of its parts.

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[1] California asserts that Congress enacted Section 418 because it "believed that the states could not be subjected to a social security tax" (Br. 13 (footnote omitted)). This is an overstatement. In fact, there was *uncertainty* about the authority of the federal government to tax the states. See Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 2d Sess., *WCMP: 97-32, Termination of Social Security Coverage for Employees of State and Local Government and Nonprofit Groups* 5 (Comm. Print 1982). Participation in the System was made voluntary so that Social Security coverage could be extended quickly, thereby avoiding " 'political barriers posed by employers concerned with tax treatment issues (i.e., perceived constitutional prohibitions against mandatory taxation of State and local governments * * *).' " *Id.* at 2-3.

[2] Appellees' suggestion that California bargained for the inclusion of a termination provision in its Section 418 agreement, for example, is misleading. See POSSE Br. 16 (describing the termination clause as

The arrangement described by appellees reduces to a simple relationship: Section 418 created a cooperative federal-state program that permitted the states to enroll their employees, and those of local governments, in a nearly universal social welfare program; Section 418 also provided that the terms of state participation were to be memorialized in written form. This arrangement is no different in kind from a host of other programs in which the federal and state governments cooperate to provide benefits to individuals. And as we explained in our opening brief (at 18-19), "[u]nlike normal contractual undertakings," programs of this sort "originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy." *Bennett* v. *Kentucky Department of Education,* No. 83-1798 (Mar. 19, 1985), slip op. 12. The 1983 amendment of Section 418 thus involved not a repudiation of a contract, but a modification of that controlling congressional judgment.

Appellees have offered no reason to believe that Section 418 agreements differ from other cooperative programs in a way that would lead to the creation of conventional contractual arrangements. CSG Amici (Br. 16) cites only *Pennhurst State School* v. *Halderman,* 451 U.S. 1, 17 (1981), for that proposition, but nothing in *Pennhurst* suggests that Congress lacks the authority to modify prospectively the conditions governing state participation in federal welfare programs. For its part, POSSE (Br. 14) notes that Social Security is not a cash grant program of the sort at issue in *Kentucky Department of Education*—

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an "obvious *quid pro quo*" for the congressional reservation of amendment authority); California Br. 30 (the "State's right in this case was acquired through negotiation as part of the consideration for the contract"). In fact, the "contractual" termination clause simply tracked the termination provision contained in the 1950 version of the Act. California could not have negotiated a different kind of termination provision, and inclusion of this clause in the agreement added absolutely nothing to the statutory rights granted California by the pre-1983 version of Section 418(g).

but it fails even to attempt to explain why this distinction supports the conclusion that Section 418 created vested rights.

Indeed, the basic flaw in appellees' argument is demonstrated by their concession (POSSE Br. 23-25; California Br. 24, 28; CSG Amici Br. 19-20, 25) that Congress retains the authority to modify the System in such a way as to require the states to participate in Social Security—even though that type of modification would render the outstanding Section 418 agreements nugatory. Appellees thus acknowledge that whatever rights are created by Section 418 agreements cannot survive a legislative modification of the System. This surely is an implicit recognition that the program at issue here is one that "remain[s] governed by statutory provisions expressing the judgment of Congress"; rights that are so easily swept away can hardly be deemed "vested."

2. This leads to a second obvious flaw in appellees' position. Even if Section 418 agreements are contracts, appellees acknowledge that there could have been no constitutional objection had Congress disregarded those agreements altogether and required permanent state participation in the System simply by enacting new legislation to that effect. But appellees insist that the 1983 amendment is invalid because, while it accomplished precisely that result, it did so by making the existing agreements nonterminable (POSSE Br. 24-25; California Br. 24; CSG Amici Br. 19-20). While their reasoning on this point is difficult to grasp, appellees appear to contend that the *form* of the 1983 amendment amounted to a repudiation of existing contracts rather than a modification of the System, and that the amendment should be deemed improper for that reason.

This distinction, however, is so exceedingly fine as to be entirely without substance. The effect of legislation using language acceptable to appellees would have been identical

to the actual effect of the 1983 amendment: both types of legislation would require the continued participation in the System of currently enrolled state and local government employees.[3] Yet as we explained in our opening brief (Gov't Br. 29-32), congressional legislation cannot be challenged on the ground that it uses the wrong verbal formulation. The Court has thus flatly rejected the argument that, "in a statute such as this, regulating purely economic matters, * * * Congress' choice of statutory language can invalidate the enactment when its operation and effect are clearly permissible." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 23-24 (1976). See also *United States* v. *Ptasynski*, 462 U.S. 74, 84, 86 (1983). Appellees evidently have no answer to this principle, for neither they nor amici CSG so much as cite the Court's decision in *Turner Elkhorn Mining*, let alone attempt to distinguish it.

The only rationale offered by appellees in support of their assertion that the form of the 1983 amendment affects its constitutionality is their vague suggestion (POSSE Br. 28; CSG Amici Br. 25-26) that the Constitution is concerned with process as well as with substance. But appellees do not contend that they were due any sort of "process," as that term is normally understood, prior to Congress's enactment of the 1983 amendment. In any event, as *Turner Elkhorn Mining* demonstrates—in the context of a case that specifically addressed the Fifth Amendment's Due Process Clause (see 428 U.S. at 23)[4]—Congress's choice of one verbal formulation rather than another does not implicate any value protected by the Constitution.

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[3] Indeed, the only difference between the two forms of legislation is that the one chosen by Congress is *more* accommodating to the states; it leaves the individualized Section 418 agreements largely intact.

[4] It should be noted that this case does not involve the Fifth Amendment's Due Process Clause. Because states are not "persons" within the meaning of that Clause (see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966)), California may not advance a due process

3. Even if California's Section 418 agreement is a contract, appellees can prevail only if the 1983 amendment effected a taking of their property rights. Appellees apparently recognize this, acknowledging (California Br. 29-30; CSG Amici Br. 21-22; see POSSE Br. 34-35) the relevance of the three-part takings analysis repeatedly used by the Court (see Gov't Br. 42-43) and recently restated in *Connolly* v. *Pension Benefit Guaranty Corp.*, No. 84-1555 (Feb. 26, 1986), slip op. 13.

Appellees nevertheless devote virtually their entire discussion of takings law to a description of the financial impact of the 1983 amendment on California. Yet the Court has made it clear that even a profound economic effect, standing alone, does not render governmental action a taking. See, *e.g.*, *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 131 (1978); *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915). And appellees do not deny that California retains the principal benefit that induced it to enter into its Section 418 agreement—participation in the System.[5] The federal government is thus not abrogating a contract provision without continuing to provide substantial benefits in return; rather, the government in requiring states to leave their employees in the System is benefitting 115 million workers by maintaining an equitable nationwide social insurance program to help alleviate the problems caused by old age and disability.

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claim. And as we have explained elsewhere (see J.S. 9-10 n.9), the POSSE plaintiffs do not have standing to challenge the 1983 amendment. The district court, in any event, considered only the Taking Clause.

[5] POSSE maintains (Br. 34-35) that its entire property right in the termination provision was destroyed by the 1983 amendment, so that the legislation necessarily effected a taking. But if there is a property interest involved here, it plainly is the entire Section 418 agreement; surely, a termination provision is meaningless unless it is attached to something that can be terminated. And the Court has made it clear

Appellees largely fail, moreover, to discuss the other two takings criteria deemed relevant by the Court—the character of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. This failure is not surprising. Appellees obviously are unable to point to any physical invasion or permanent appropriation of property, the type of action that is the paradigm of a taking. See *Connolly*, slip op. 13. And they have identified no investment-backed expectations that were inspired by a belief that they had a permanent prerogative to withdraw from the System. Indeed, given appellees' concession that Congress retained the right to require the states to participate in the System at any time, any expectations grounded on such an investment could hardly have been reasonable (see Gov't Br. 45).

Against this background, as we explained in our opening brief, it cannot be said that "fairness and justice" require the invalidation of the 1983 amendment. *Connolly*, slip op. 15. As the Court recently reiterated, "[t]he purpose of forbidding uncompensated takings of property for public use 'is to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Ibid.* (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)). Plainly, appellees here are not being asked to

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that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979). Indeed, as we explained in our opening brief (Gov't Br. 20, 44), the termination provision received little attention when the Section 418 program was created, apparently because it was assumed that few employers would wish to withdraw from the System. POSSE nevertheless maintains (Br. 30-31) that the prerogative to withdraw had a significant effect in inducing *local government employers* to seek, through their states, to join the System. But the district court made no findings on that point. And it is not, in any event, the expectations of local governments that are significant; the pre-1983 version of Section 418—and the Section 418 agreement at issue here—gave only the state itself the prerogative to withdraw from the System.

shoulder a burden which rightfully should be taken on by the public. Indeed, to the extent that it would permit vested employees to receive Social Security benefits while being relieved of any obligation to pay into the System, the district court's ruling would force the government to shift a public burden onto *employees* who remain in the System. In the 1983 amendments, Congress simply directed appellees to share the burden borne by most of the nation's employers and employees.

4. A final issue in this case involves the enforceability of contracts that purport to bind Congress not to exercise its sovereign powers for the general welfare. Given appellees' concession that Congress retained the authority to require the states to participate in the System despite the existence of the Section 418 agreements, there is no need for the Court to reach this question. Because appellees have misstated the basis of the 1983 amendment, however, a brief discussion of the issue is in order.

Quoting *Lynch* v. *United States*, 292 U.S. 571 (1934); *Perry* v. *United States*, 294 U.S. 330 (1935); and the *Sinking-Fund Cases*, 99 U.S. 700 (1878), appellees spend considerable time (POSSE Br. 17, 27; California Br. 14-15; CSG Amici Br. 17-18) establishing that a sovereign may bind itself contractually. That proposition undoubtedly is correct, so far as it goes. But appellees nowhere deny the repeated holdings of this Court (see Gov't Br. 32-35)—reiterated in *Lynch* itself (see 292 U.S. at 579, 580)—to the effect that contracts obligating the United States not to legislate for the general welfare are unenforceable, so long as the legislation at issue was intended to do more than simply save money by baldly repudiating government obligations.[6]

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[6] The Court has explained that "the exercise of the police power cannot be limited by contract for reasons of public policy" (*Northern Pac. Ry.* v. *Minnesota ex rel. Duluth*, 208 U.S. 583, 598 (1980)); every contract with the state thus is "made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power." *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 108-109 (1938). The outcome in *Lynch* turned on the Court's conclusion that, when Congress repudiates contracts simply to reduce expenditures, the abrogation does not involve "the exercise of the police or any other power" (292 U.S. at 580). See Gov't Br. 36-37.

Instead, appellees insist that the 1983 amendment was not designed to advance the general welfare; they maintain that the amendment, like the challenged legislation in *Lynch*, was motivated by a simple desire to bolster the federal fisc (POSSE Br. 29-30; California Br. 25-27; CSG Amici Br. 20). This assertion, however, is demonstrably inaccurate. As a whole, the Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 *et seq.*, may have been enacted to preserve the solvency of the System. See H.R. Rep. 98-25, 98th Cong., 1st Sess. Pt. 1, at 11-13 (1983). But nowhere in its discussion of the legislation specifically at issue here did Congress suggest that Section 418(g) was amended for fiscal reasons.

To the contrary, as we explained in considerable detail in our opening brief (Gov't Br. 38-41), Congress acted to protect the interests of state and local government employees while preserving public confidence in the System as a whole. Congress found that when employers withdrew from the System, short-term employees were deprived of the protections of Social Security despite having made payments into the System.[7] Employees whose rights already had vested, meanwhile, obtained a windfall. And lower-wage employees who were withdrawn from the

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[7] Appellees (POSSE Br. 31) assert that localities that wish to deprive their employees of Social Security coverage are not acting irresponsibly because "many if not most California local government entities have carried double coverage." We are aware of no record evidence to support this contention. More importantly, the legislative history demonstrates that Congress was concerned about those governmental workers in California or elsewhere who are *not* "double-covered," and who therefore would be left without social insurance were they de-

System found it difficult to obtain comparable pension protections elsewhere. The 1983 amendment was intended to cure these defects in the System, while curbing resentment on the part of employees who continued to participate in Social Security and who found themselves inheriting the tax burden of workers whose rights already had vested.

When a Fifth Amendment challenge is brought against legislation of this sort—which manifestly is designed to accomplish a broad social good—cases such as *Lynch* are simply inapposite.[8] If California's Section 418 agreement could somehow be construed to constrain Congress's authority to enact the 1983 amendment, then, the agreement would be unenforceable.

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prived of Social Security. The back-up coverage provided by a state or private pension plan, moreover, is unlikely to match that offered by Social Security. See Gov't Br. 39-41. Similarly, amici note (CSG Br. 22) that "[o]ne may reasonably question whether [it is] good social policy" for a locality to eliminate its workers' Social Security coverage to save money, but assert that states should not be required to pay for the coverage of employees who wish to withdraw from the System. As we explained in our opening brief (Gov't Br. 6. n.6), however, the pre-1983 version of Section 418 permitted states to withdraw from the System without consulting affected employees. As a result, there is no way of knowing whether the employees whose coverage is at issue in this case actually wish to surrender the protections of Social Security.

[8] Appellees also acknowledge that, even in cases where the challenged legislation is motivated entirely by the sovereign's fiscal self-interest, the Due Process Clause does not bar the government from abrogating a contract when the legislation is both " 'reasonable and necessary to serve the * * * purposes claimed by the State.' " CSG Amici Br. 24 (quoting *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 29 (1977)). See POSSE Br. 36-37. While the Court has suggested that a less rigorous standard may govern due process challenges to federal legislation (see *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, No. 83-1492 (Mar. 18, 1985), slip op. 20), it is plain—if the Due Process Clause is relevant here at all (see note 4, *supra*)—that the 1983 amendment more than meets even appellees'

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

APRIL 1986

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test. In enacting the amendment, Congress intended to protect workers whose rights had not yet vested in the System while precluding windfalls for employees whose rights had vested. It is difficult to imagine a more effective or precisely tailored means of accomplishing this purpose than the one chosen by Congress. Including only new state employees in the System, as appellees propose (POSSE Br. 38), would not have cured the problems identified by Congress. And including *all* state and local government employees, a course also suggested by appellees (see POSSE Br. 37-38; CSG Amici Br. 25), would have been a more drastic response, which would have effectively abrogated not only the termination clause but also every other provision of the Section 418 agreements.

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No. 85-521

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, Secretary of Health and Human Services, *et al.*,
Appellants,

v.

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, *et al.*,
Appellees.

UNITED STATES OF AMERICA, *et al.*,
Appellants,

v.

STATE OF CALIFORNIA,
Appellee.

On Appeal from the United States District Court for the Eastern District of California

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether Congress may, consistent with federal common law and the Fifth Amendment, unilaterally abrogate existing contractual rights of States to terminate voluntary agreements with the federal government concerning participation of States and their local subdivisions in the Social Security system?

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INTEREST OF *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and their officials throughout the United States, have a vital interest in legal issues that affect state and local governments.

This case is about process. It raises the question whether the United States may seek permissible goals through the expedient of legislatively abrogating its contracts with state and local governments. A 1950 amendment to the Social Security Act offered state and local governments the opportunity to enter into agreements for voluntary coverage of their employees. Appellee California executed such an agreement, which expressly gave the State the right to withdraw from coverage upon two years' notice to the Secretary of Health, Education, and Welfare (now Health and Human Services). The district court held that this contractual right to withdraw was a property right within the meaning of the Fifth Amendment. Accordingly, the district court held that the explicit elimination of this right in a 1983 amendment to the Act was a taking of private property for which the federal government must pay just compensation. The court directed the Secretary to accept the notices of withdrawal in lieu of payment of compensation.

Amici submit that the decision below is clearly correct. The district court noted the limited issue before it: whether Congress could unilaterally "take" the contractual right to withdraw from the federal pension system. Congress could have chosen any number of courses of action to maintain the viability of the Social Security system, and still could choose other courses, upon this Court's affirmance of the judgment below. Thus, the question before this Court is not the highly emotional and difficult policy issue of the solvency of the Social Security system. It is rather an issue of process, involving the denial of contract rights and the attempt to treat state and local governments as less than full partners in our system of federalism.

Specifically at issue in this case are termination notices from 71 political subdivisions in California covering approximately 33,750 employees. Adding other ter-

mination notices pending at the time of the 1983 amendment, 227,000 employees will be immediately affected by this Court's decision. In all, nine million state and local government employees who are currently enrolled in the Social Security system may ultimately be affected by the decision in this case. (J.S. 8-9.) Because reversal of the decision below will have a direct and immediate adverse effect on matters of compelling importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

1. As originally enacted, the Social Security Act of 1935 excluded from coverage all employees of state and local governments, primarily because of questions about the constitutionality of any general levy of the employer tax on States and localities. Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 2d Sess., WMCP: 97-34, *Termination of Social Security Coverage for Employees of State and Local Government and Nonprofit Groups* 20 (Comm. Print 1982) [hereinafter cited as H.R. Comm. Print 97-34]. During the 1940's, a political consensus emerged that coverage of the Social Security system could be extended to such employees only through voluntary agreements with state and local governments. *Ibid.*

The result of this consensus was the Social Security Act Amendments of 1950, ch. 809, § 106, 64 Stat. 514 *et seq.*, codified at 42 U.S.C. (& Supp. I) 418 [hereinafter the "1950 Amendments"]. In light of the strong political and constitutional objections of States, local governments, and their employees to any mandatory participation, Congress recognized that "coverage had to be voluntary." H.R. Comm. Print 97-34, at 2. Section 106

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[1] Pursuant to Rule 36 of the Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

of the 1950 Amendments, which added section 218 to the 1935 Act, 42 U.S.C. (Supp. I) 418 [hereinafter "Section 418"], reflected this congressional intent. Section 418 was entitled "Voluntary Agreements for Coverage of State and Local Employees," and provided, in pertinent part:

> (a)(1) The Administrator shall, at the request of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this title to services performed by individuals as employees of such State or any political subdivision thereof. Each such agreement shall contain such provisions, not inconsistent with the provisions of this section, as the State may request.

Under the 1950 Amendments, a State could opt to enroll within the system all, or only specified "coverage groups," of eligible state and local employees. 42 U.S.C. 418(b)(5). A State electing to enter into a voluntary agreement for coverage was required to collect and pay to the Secretary of the Treasury "amounts equivalent to the sum of the taxes" that would be due if the covered employees were otherwise subject to the Act. 42 U.S.C. (Supp. I) 418(e)(1).

"Consistent with the voluntary approach to coverage of these groups of employees, the 1950 Amendments also provided that a State could terminate the coverage of its own employees or the employees of any political subdivision, at the instigation either of the State or at the request of the political subdivision itself." H.R. Comm. Print 97-34, at 20. The right to withdraw, seen by Congress as a "necessary corollary" to the voluntary nature of the system (*id.* at 3), was provided in Section 418(g). The States were given the right to terminate the voluntary agreements, in whole or part, upon two yaers' notice to the Administrator of the system (now the Secretary of Health and Human Services). 42 U.S.C. 418(g)(1). The option to terminate, however, could not be exercised until the voluntary agreement had been in

force for five years (42 U.S.C 418(g)(1)(A) and (B)); once a group's coverage had terminated, that group could not be re-enrolled in the system. 42 U.S.C. 418(g)(3).[2]

2. Effective January 1, 1951, the State of California and the United States executed a written agreement (the "1951 Agreement") providing for the extension of Social Security coverage to specified state and local "coverage groups." The 1951 Agreement, signed by California's Director of Finance on behalf of the State and by the Acting Federal Security Administrator on behalf of the United States (J.A. 29-33), contained a paragraph entitled "Termination by the State." That paragraph, in accordance with the provisions of the 1950 Amendments, allowed the State to terminate the agreement, either in its entirety or with respect to any coverage group, upon two years' advance notice. (J.A. 31.)[3] In order to carry out its obligations under the 1951 Agreement, California then enacted detailed enabling legislation. Cal. Gov't Code §§ 22000-22603 (West 1980 & Supp. 1985). Pursuant to that legislation and the 1951 Agreement, California entered into individual agreements with those public agen-

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[2] As the Secretary notes, the 1950 Amendments generally left to the States the decision as to which coverage groups would be included in an agreement, as well as the decision whether a notice of termination would be filed. (U.S. Br. at 4-5.) However, California, as noted below, made such decisions solely on the basis of the wishes of the affected subdivisions.

[3] Section (F) of the 1951 Agreement provides:

> The State, upon giving at least two years' advance notice in writing to the Administrator, may terminate this agreement, either in its entirety or with respect to any coverage group, effective at the end of a calendar quarter specified in the notice, provided, however, that the agreement may be terminated in its entirety only if it has been in effect not less than five years prior to receipt of such notice, and provided further that the agreement may be terminated with respect to any coverage group only if it has been in effect with respect to such coverage group for not less than five years prior to receipt of such notice.

cies wishing to participate in the program. (J.S. App. 5a.)

Under these agreements, the public agencies promised to reimburse the State for the costs of their participation in the system. The agencies were allowed to withdraw from the state agreements (and thus the system) upon two years' advance notice.

The 1951 Agreement has been modified on some 1,217 occasions. (J.A. 50.) The vast majority of these modifications were to add or delete particular coverage groups. *Ibid.* Five of the modifications, however, were substantive amendments to the original Agreement. (J.A. 34-42, 50.) These modifications were in traditional contract form, signed by representatives of both the United States and the State of California. (J.A. 34-42.)

3. Like California, each of the States entered into voluntary agreements with the United States concerning Section 418 coverage of specified state and local employees.[4] The first termination by a State of coverage of a political subdivision occurred in 1959. (H.R. Comm. Print 97-34, at 26.) Terminations gradually increased thereafter on an annual basis until the mid-1970's (*ibid.*), but in each year, the total number of employees entering the system greatly exceeded the number leaving the system through terminations. *Id.* at 23, 24.

The last year in which the number of newly covered positions exceeded those covered by termination notices was 1976. *Id.* at 23. In the six years thereafter, the number of governments filing termination notices increased, and, in each such year, the number of employees terminating coverage exceeded those who were newly covered. *Id.* at 23-26. By 1983, termination notices were pending for 634 state and local entities (H.R. Rep. No.

[4] Maine, Massachusetts, Nevada, and Ohio did not choose to include state employees within their voluntary agreements, but did cover one or more political subdivisions. (J.A. 59.)

25, 98th Cong., 1st Sess., Pt. 1, 18 (1983)); 287 of these notices would become effective, according to the terms of the applicable voluntary agreements, by the end of 1983. (J.A. 61.) At the request of its political subdivisions, California had filed 71 termination notices on behalf of some 33,750 local government employees. (J.A. 61.) These notices were, according to the explicit terms of the 1951 Agreement, to become effective at the end of 1983.[5]

4. Noting that the terminations posed the risk of a substantial loss of revenue to the Social Security system (H.R. Comm. Print 97-34, at 13-14), Congress in 1982 considered a number of possible restrictions on termination activity. *Id.* at 15-17. The possibility of imposing mandatory coverage of all state and local employees was considered, as was the possibility of allowing withdrawal only after notification to and a vote by affected employees. *Id.* At the same time, Congress considered simply eliminating the option for voluntary termination in the various agreements. *Id.* at 16-17. The Subcommittee on Social Security of the House Committee on Ways and Means cautioned that such a course would raise "constitutional ramifications [which] can ultimately be decided only by the Supreme Court." *Id.* at 16-17.

Notwithstanding this concern, Congress, in 1983, as part of the Social Security Amendment Act of 1983 [hereinafter the "1983 Amendment"], Pub. L. No. 98-21, 97 Stat. 65 *et seq.*, amended Section 418(g) to nullify the voluntary termination provision of the 1951 Agreement and the various other voluntary agreements. Section 103 of the 1983 Amendment provided:

> (a) Section 218(g) of the Social Security Act is amended to read as follows:

[5] One State, Alaska, terminated coverage for *state* employees, while continuing coverage for employees of certain political subdivisions. (J.A. 59.)

"Duration of Agreement

"(g) No agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after the date of enactment of the Social Security Amendments of 1983."

(b) The amendment made by subsection (a) shall apply to any agreement in effect under section 218 of the Social Security Act on the date of the enactment of this Act, without regard to whether a notice of termination is in effect on such date, and to any agreement or modification thereof which may become effective under such section 218 after that date.[6]

5. In the wake of the enactment of the 1983 Amendment, these suits were commenced in the United States District Court for the Eastern District of California to challenge the validity of Section 418(g), as amended. The plaintiffs in the first suit were several public agencies of the State of California, their employees and local taxpayers, and a group called Public Agencies Opposed to Social Security Entrapment ("POSSE"). These plaintiffs claimed, *inter alia*, that the 1983 Amendment deprived them of contract rights under the Agreement without just compensation; that the enactment deprived them of contract rights without due process of law; that the Amendment violated the Tenth Amendment; and that the United States had breached its contractual duties under the 1951 Agreement. (J.A. 7-21.) The plaintiff in the second suit was the State of California, which alleged that the 1983 Amendment violated the Tenth Amendment and was a breach of the contractual duties of the United States under the 1951 Agreement. (J.A. 22-28). Each action sought appropriate injunctive and declaratory relief.

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[6] The effective date of the 1983 Amendment was April 20, 1983. (Pub. L. No. 98-21, § 103(b), 97 Stat. 72.)

The district court granted summary judgment to the plaintiffs. The district court began by holding that not only the State, but also the public agencies and their employees, had standing to raise the claims set forth in the complaints.[7] The district court held that the right to terminate the 1951 Agreement on two years' notice "is a contractual right running in favor of the public agencies." (J.S. App. 21a.) Citing the settled rule that "rights which arise out of contracts with the United States are 'property' within the meaning of the Fifth Amendment" (J.S. App. 19a), the district court held that the 1983 Amendment was invalid, since "Congress clearly and explicitly intended to deprive the plaintiffs of their right to withdraw from the contract." (J.S. App. 33a.)[8]

In holding for the appellees, the district court was careful to note the limited scope of its judgment. The district court assumed, *arguendo*, that Congress had the power to force state and public agencies to provide Social Security coverage to their employees, citing *Garcia v. San Antonio Metropolitan Transit Authority*, —— U.S. ——, 105 S.Ct. 1005 (1985). Such legislation, the court assumed, would pass constitutional muster because the State's *contractual* right to withdraw from the 1951 Agreement would be unimpaired, even though such termination would be ineffective in light of a newly imposed

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[7] The Secretary suggested in a footnote in his Jurisdictional Statement that the various POSSE plaintiffs were not properly before the district court. (J.S. 10 n.9). The Secretary's brief on the merits, however, does not challenge the district court's ruling as to standing, other than by making passing reference to that footnote. (U.S. Br. at 17 n.15.)

[8] The district court noted that Congress provided no means of compensation for depriving plaintiffs of that right. The court refused to remit plaintiffs to a suit in the Court of Claims to seek "just compensation," since the legislative history of the 1983 Amendment plainly demonstrated that Congress had no intent to authorize such compensation. (J.S. App. 33a-34a.)

general *statutory* obligation to participate in the system. The 1983 Amendment, however, was not such legislation. Rather, it was specifically designed to divest the appellees of their contractual right to terminate participation. For this reason, and this reason alone, the district court found the 1983 Amendment invalid. (J.S. App. 3a-4a, 31a-32a.)

SUMMARY OF ARGUMENT

1. The sole issue presented by this case is whether Congress may unilaterally abrogate the right to withdraw contained in the 1951 Agreement. The case does not involve Congress' general power to subject state and local employees to coverage under the Social Security system. The case does not involve a contention that the 1950 Amendments, in and of themselves, created a contract between the appellees and the United States. Nor is the issue presented whether the 1983 Amendment somehow unconstitutionally impairs contracts between private parties. Rather, the narrow issue before the Court is whether the United States may unilaterally repudiate its *own* contractual promises.

2. The 1951 Agreement plainly is a contract between the United States and the appellees. It has all the facial indicia and legal characteristics of a contract: it is reduced to written form, deals with a proper subject, is signed by the responsible parties, and involves the exchange of consideration. Moreover, the 1950 Amendments, by their very terms, clearly presupposed that coverage of the Social Security system would only be extended to state and local employees through such "voluntary agreements."

As in the case of all contracts, the 1951 Agreement resulted from the voluntary decision of California to obtain certain benefits for itself, in return for specified consideration, on specified terms and conditions. The right to terminate the Agreement on two years' notice

was an integral part of the contract, and was found by the district court to be one of the "motivating causes" of the State's decision to enter into the Agreement.

3. Once the United States enters into a contract, it is as much bound by its promises as any individual. *Sinking-Fund Cases*, 99 U.S. (9 Otto) 700 (1879); *Lynch v. United States*, 292 U.S. 571 (1934). Such contracts are to be interpreted according to the law applicable to contracts between private individuals. *Ibid.*

No principle of general contract law exempts the United States from the promises made in the 1951 Agreement. Nor is the United States permitted to repudiate the Agreement simply because the federal government is a sovereign. Rather, "the right to make binding obligations is a competence attaching to sovereignty." *Perry v. United States*, 294 U.S. 330, 353 (1935). The 1951 Agreement involves no surrender of the essential attributes of governmental sovereignty; Congress remained fully free thereafter to legislate on the subject of state and local employee Social Security coverage in any otherwise constitutional general manner.

The United States is prohibited from repudiating the 1951 Agreement not only by federal common law of contract, but also by the Just Compensation and Due Process Clauses of the Fifth Amendment. A valuable contractual "right" was taken from the appellees by the 1983 Amendment; the right to terminate the Agreement is worth literally billions of dollars to appellees.

4. When the United States repudiates its own contracts, the appropriate standard of review is suggested by *United States Trust Co. v. New Jersey*, 431 U.S. 1, 29 (1977)—the impairment must not only be for a public purpose, but must also be both "reasonable and necessary to serve" that purpose. Here, the repudiation of the 1951 Agreement was not necessary to achieve Congress' purpose of mitigating financial losses to the Social

Security system resulting from terminations of coverage of state and local employees. The 1983 Amendment and its legislative history contain numerous examples of other approaches, none of which involves the United States' repudiation of its contractual agreements. Because less drastic means to solve the problem were plainly available, abrogation of the 1951 Agreement was constitutionally impermissible.

ARGUMENT

Like the district court, we begin by emphasizing what this case is and is not about. It is *not* about the right of Congress to subject all state and local employees to coverage of the Social Security system. We assume *arguendo*, as did the district court, that such universal coverage would pass constitutional muster. See *Garcia v. San Antonio Metropolitan Transit Authority, supra.*[9]

Nor does this case present the question, faced by the Court in *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, —— U.S. ——, 105 S.Ct. 1441 (1985), whether a statutory scheme in and of itself can be interpreted as a contract between the United States and a regulated party, Here, *amici* do not contend that the 1950 Amendments created a contract between the States and the United States. Rather, those Amendments simply authorized the Secretary to enter into voluntary agreements with those States that so desired. It is the 1951 Agreement between California and the United States, not the statute, that creates the contract here.

This case is also not concerned with whether general regulatory legislation by the Congress unconstitutionally impairs contractual obligations between two private parties. *Compare, e.g., Connolly v. Pension Benefit Guaranty Corp.*, Nos. 84-1555, 84-1567 (Feb. 26, 1986), slip op. 12; *National Railroad Passenger Corp.*, 105 S.Ct. at 1455-56. *Cf. Exxon Corp. v. Eagerton*, —— U.S. ——, 103 S.Ct. 2296 (1983); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, —— U.S. ——, 103 S.Ct. 697 (1983); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (Contract Clause cases). Rather, this case squarely presents the issue of the appropriate test when Congress abrogates the United States' *own* contractual obligations to the States, an issue expressly pretermitted by the Court in *National Railroad Passenger Corp.* (105 S.Ct. at 1455 n.24.)

In short, the sole issue presented by this case is whether the United States may, for an arguably laudable public purpose, simply ignore its contract with a State when the contractual duties become inconvenient or financially burdensome. *Amici* submit that the district court correctly held the United States to its agreement, and that the judgment below should be affirmed.

I. THE 1951 AGREEMENT BETWEEN CALIFORNIA AND THE UNITED STATES IS A CONTRACT

The 1951 Agreement concerning California's voluntary participation in the Social Security system has all the facial indicia of a contract. As this Court has noted in an analogous context, "[a]ll the elements of a contract met in the transaction—competent parties, proper subject-matter, sufficient consideration, and consent of minds." *McGee v. Mathis*, 71 U.S. (4 Wall.) 143, 155 (1866). The Agreement is signed by authorized parties, imposes mutual legal obligations on the parties, and envisions a specific performance. *See generally* Restatement (Second) of Contracts § 1 (1981).

Nonetheless, the Secretary argues that the Agreement is not truly a contract because it was entered into in order to implement a general scheme of regulation. (U.S. Br. at 18-19.) The argument does not withstand analysis.

[9] We also assume *arguendo* that Congress could subject the employees of selected States and subdivisions to coverage under the system, if there were a rational basis for the inclusion of such employees and the exclusion of others.

It is, of course, common ground that when Congress establishes a legislative program, "the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *National Railroad Passenger Corp.*, 105 S.Ct. at 1452 (quoting *Dodge v. Board of Education*, 302 U.S. 74, 79 (1937)). See U.S. Br. at 19-20. This presumption, however, is wholly inapplicable in the case at hand. As this Court has noted in the very cases upon which the United States relies, "'[i]f [the law] provides for the execution of a written contract *on behalf of the state* the case for an obligation binding upon the state is clear.'" *National Railroad Passenger Corp.*, 105 S.Ct. at 1452 (quoting *Dodge v. Board of Education*, 302 U.S. at 78) (emphasis in original).

The 1950 Amendments plainly provide for the execution of a "written contract" on behalf of the United States; the 1951 Agreement is that contract. The section of Pub. L. No. 98-21 that added Section 418 to the Act was entitled "*Voluntary Agreements* For Coverage of State and Local Employees." (Emphasis added.) Subsection (a)(1) of Section 418 expressly authorizes negotiation by the parties, and inclusion in the agreements, of "such provisions, not inconsistent with the provisions of this section, as the State may request."

It would be difficult to draft statutory language that more directly contemplates the execution of a written contract. Moreover, the history of the 1950 Amendments clearly indicates that Section 418 was passed in order to allow the States to determine whether or not to enter into voluntary contractual agreements with the federal government concerning Social Security. There was considerable doubt at the time of the Amendments about the power of Congress to subject the States to the system. (H.R. Comm. Print 97-34, at 2-3.) In addition, there was substantial political opposition among the States and state and local employees to subjecting such

employees to the system, particularly in light of the wide coverage of state retirement plans. *Id.* at 20. For these reasons, Congress concluded that "all coverage of State and local employees must be on a voluntary basis." S. Rep. No. 1669, 81st Cong., 2d Sess. 14 (1950). *See also* H.R. Comm. Print 97-34, at 2 ("coverage had to be voluntary").

The right to terminate such voluntary agreements on two years' notice was viewed by Congress as "consistent with the voluntary approach to coverage" (H.R. Comm. Print 97-34, at 20), and a "necessary corollary" to the voluntary approach. *Id.* at 3. *See also* S. Rep. No. 1669, *supra*, at 14 (termination provision designed "[i]n order to safeguard the interest of all parties concerned"). Under any realistic analysis, the right to terminate was offered to the States as an inducement to enroll state and local employees in the system, in order to make the voluntary agreements authorized by Section 418 more attractive to state and local governments. California signed the 1951 Agreement with the clear understanding that it was acquiring thereby not only coverage of specified employee groups, but also the right to terminate such coverage on two years' notice.[10]

In short, the 1950 Amendments were designed to give the States a choice. They could either remain outside the Social Security system, or they could contract to enter it. The contract contemplated by the Amendments—and signed by California—offered not only employee coverage, but the right to terminate such coverage on specified notice. As the district court found, the termination clause in the 1951 Agreement was "one of the motivating causes of [California's] making the contract." (J.S. App. 22a.) Once having persuaded California to sign an agree-

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[10] Indeed, California so plainly believed that it had such a right that it offered local subdivisions contracting for Social Security coverage precisely the same option. See Cal. Gov't Code § 22310 (West Supp. 1985).

ment containing explicit language spelling out the right to terminate, the United States can now hardly argue that such language is not a matter of contract.

Indeed, in the context of federal grant programs, this Court has repeatedly found the existence of contracts between the United States and state governments in far less compelling circumstances. In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), even in the absence of a formal written agreement, the Court held that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* at 17.[11]

Given the legislative history of the 1950 Amendments and the presence of a written agreement, no different conclusion is possible here. Nor is the 1951 Agreement deprived of its contractual character by virtue of the general language in 42 U.S.C. 1304 reserving to Congress the "right to alter, amend, or repeal any provision of the [Social Security Act]." As this Court stated in *National Railroad Passenger Corp.*, 105 S.Ct. at 1453, such language may well be powerful proof that a statute, in and of itself, was not intended to create contractual rights. But here, as the district court noted, Congress' right to amend the statute whenever it pleases is not at issue; what is at issue is Congress' right unilaterally to amend the Agreement. (J.S. App. 31a-32a.) The reservation clause simply allows Congress "to provide for what shall be done in the future, and . . . what preparation shall be made for the due performance of contracts already entered into." *Sinking-Fund Cases*, 99 U.S. (9 Otto) 700, 721 (1879). Such reservation language does

[11] The principle is hardly of recent origin. In 1866, Chief Justice Chase stated in *McGee v. Mathis*, 71 U.S. (4 Wall.) at 155: "It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State, constituted a contract."

not enable the United States to "undo what has already been done, and it cannot unmake contracts that have already been made." *Ibid.*

II. THE UNITED STATES CANNOT UNILATERALLY ABROGATE ITS CONTRACT WITH CALIFORNIA

It has long been settled that:

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.

Sinking-Fund Cases, 99 U.S. (9 Otto) at 719. As Justice Brandeis stated in his opinion for the Court in *Lynch v. United States*, 292 U.S. 571, 579 (1934), "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." 292 U.S. at 579. *See also Perry v. United States*, 294 U.S. 330, 352 (1935) ("When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments."); *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 564 (1946) ("Normally contracts between the United States and others are construed as contracts between private parties.")

The Secretary does not contend that, had the 1951 Agreement been between two private parties, some general tenet of contract law would have allowed one party unilaterally to excise from the contract the right of the other to terminate the arrangement on two years' prior notice. Rather, the Secretary contends that because the United States is a sovereign, such ordinary principles of contract do not restrict its power to repudiate its promises. The argument is not only contrary to the

Sinking-Fund Cases and their progeny; it also has been expressly rejected by this Court.

In *Perry*, the United States argued that it had the right to repudiate the gold clause in Government bonds, since "the government cannot by contract restrict the exercise of a sovereign power." 294 U.S. at 353. In rejecting the argument, Chief Justice Hughes noted that "the right to make binding obligations is a competence attaching to sovereignty." *Ibid.*[12] The Court's opinion quoted with approval from Alexander Hamilton's communication to the Senate of January 20, 1795 (3 Hamilton's Works 518, 519), to the effect that

> "[W]hen a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it."

294 U.S. at 351 n.2.

Nothing in the 1951 Agreement takes it outside the scope of these basic rules. The fact that the Agreement is between the United States and a State, rather than between the federal government and an individual, hardly reduces its contractual status. This Court has repeatedly emphasized that the States are bound to honor their contractual promises to the United States. *See, e.g., Bell v. New Jersey*, 461 U.S. 773 (1983); *Pennhurst State School and Hospital v. Halderman, supra; McGee v.*

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[12] *Cf. Bell v. New Jersey*, 461 U.S. 773, 790 (1983) ("Requiring States to honor the obligations voluntarily assumed as a condition of federal funding . . . simply does not intrude on their sovereignty.").

Mathis, supra. The analysis perforce is bilateral; if the States are bound by contract to honor their obligations to the United States, then the United States in turn must be bound by its contractual promises to the States.

The 1951 Agreement is not somehow exempt from the sweep of this Court's prior decisions simply because it does not embody a traditional business transaction or "investment-backed expectations." (U.S. Br. at 43). In *Lynch*, this Court expressly rejected the contention that contracts "not entered into by the United States for a business purpose" were entitled to different weight than those involving borrowings or other forms of finance. 292 U.S. at 576. Although the War Risk insurance program was, in the Court's view, analogous in "benevolent purpose" to other benefits programs for veterans, Justice Brandeis nonetheless squarely held that "the policies, albeit not entered into for gain, are legal obligations of the same dignity as other contracts of the United States and possess the same legal incidents." *Ibid. Cf. FHA v. The Darlington, Inc.*, 358 U.S. 84, 93-98 (1958) (Harlan, J., dissenting) (applying *Lynch* analysis to FHA mortgage).

Similarly, the Secretary's argument that the United States may not contract away its sovereign powers, while stating a basic axiom, misses the mark here. First, as this Court held in *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977), "a contract that surrenders an essential attribute of [governmental] sovereignty" is "invalid *ab initio*." Here, far from treating the 1951 Agreement as invalid, the United States instead seeks to have it both ways; it attempts to hold appellees to their bargain under the 1951 Agreement, while at the same time rewriting the bargain. No decision of this Court remotely supports such an approach.

More important, the 1951 Agreement in no way involves the surrender of an essential attribute of the federal government's sovereignty. Congress retains full power to

legislate on the subject of Social Security coverage of state and local employees. It is basic that the United States "cannot be held liable for an obstruction to the performance of the particular contract resulting from its *public and general acts* as a sovereign." *Horowitz v. United States*, 267 U.S. 458, 461 (1925) (emphasis supplied). *See also Lichter v. United States*, 334 U.S. 742 (1948) (War Contracts Renegotiation Act not taking of private property); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1968) (general regulations permissible even when they impose upon a housing authority an additional obligation not contained in contract with HUD). Thus, as we have already noted, it may be assumed *arguendo* that Congress, in 1983, could have simply decided to subject all state and local employees to coverage, even though such a general act would have rendered the right to withdraw in the 1951 Agreement practically meaningless.

The 1983 Amendment, however, is most assuredly not a "public and general" piece of legislation that coincidentally affects rights of California under the 1951 Agreement. Rather, as the district court held, "Congress clearly and explicitly intended to deprive the plaintiffs of their right to withdraw from the contract." (J.S. App. 33a.) In this respect, the 1983 Amendment is no different than the legislation struck down in *Lynch*. There, Congress sought to relieve the financial burdens of the Great Depression by explicitly renouncing its obligations under insurance contracts; here, it sought to mitigate the financial difficulties faced by the Social Security system by explicitly renouncing contractual obligations to the States.

In short, nothing in the sovereign nature of the federal government exempts the 1951 Agreement from 'the law applicable to contracts between private individuals." *Lynch*, 292 U.S. at 579. Because it is settled that federal common law controls questions concerning "[t]he validity and construction of contracts through which the

United States is exercising its constitutional functions" (*United States v. Allegheny County*, 322 U.S. 174, 183 (1944)), the district court's judgment should be affirmed as a matter of contract law alone.

But, as the district court noted, when the United States enters into a contract, its obligations thereafter are dictated by more than just contract law. "Contract rights are a form of property" (*United States Trust Co.*, 431 U.S. at 19 n. 16), and thus "[r]ights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Lynch*, 292 U.S. at 579. *See also United States v. Central Pacific Railroad Co.*, 118 U.S. 235 (1886). Accordingly, the United States is barred from repudiating its contractual duties by both the Just Compensation Clause and the Due Process Clause. *Lynch*, 292 U.S. at 579. *See also Thorpe*, 393 U.S. at 278-79 & nn. 31-33 (Due Process Clause prohibits repudiation of contract obligations by United States).[13]

In an attempt to avoid the holding in *Lynch*, the Secretary argues that "the economic effect of the challenged legislation is not so great as to amount to a taking" (U.S. Br. at 44), because California will remain able to participate in the Social Security system in the future.

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[13] This Court has held that States are not "persons" within the purview of the Fifth Amendment's Due Process Clause. *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966). The district court, however, was correct in holding that both the appellee political subdivisions and the individual employees had standing to raise that constitutional objection to the 1983 Amendments. *Cf. Monroe v. Pape*, 365 U.S. 167 (1961) (municipality a "person" under 42 U.S.C. § 1983); *Thorpe*, 393 U.S. at 278-79 (considering due process arguments by local housing authority).

In any event, it is settled that the Fifth Amendment's prohibition against the taking of "private property" without just compensation applies to the taking of the property of state and local governments. *United States v. 50 Acres of Land*, —— U.S. ——, 105 S.Ct. 451, 456 (1984).

What the Secretary fails to recognize, however, is that California—and the other contracting States—must, under the 1983 Amendment, continue to pay large sums of money to the Secretary for coverage of employees of political subdivisions that no longer desire such coverage. Indeed, the Secretary's brief concedes that if the States are allowed to exercise their contractual rights to withdraw, the total annual savings for them and the affected employees will be in the area of $500 million to $1 billion. (U.S. Br. at 7). By any applicable constitutional measure, such an effect is hardly *de minimis*.[14]

In this case, the record plainly demonstrates that the "economic effect" of such forced expenditures upon the appellees is substantial. Officials of two California cities submitted affidavits—uncontroverted by the United States—attesting that eliminating expenditures for Social Security coverage of their employees (who are already covered under the California Public Employees Retirement System) will allow the municipalities to avoid reductions in essential services and layoffs of many of the covered employees (J.A. 64-73).[15] One may reasonably question whether such a course of action would involve good social policy. It is plain, however, that the economic effect of the 1983 Amendment is enormous; the contract right embodied in the termination clause is worth billions of dollars to the States.[16]

Under any realistic analysis, the 1983 Amendment explicitly annulled valuable contract rights of the appellees under the 1951 Agreement. Although the Secretary argues that such action was undertaken in the

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[14] Here, unlike *Connolly v. Pension Benefit Guaranty Corp.*, the amounts that the States are required to pay under the contracts are being taken for the use of the United States. *See id.*, slip op. 12.

[15] For this reason, the employees of one of the cities initiated the discussion which culminated in the decision to withdraw from the Social Security system. (J.A. 65).

[16] In 1982-83, for example, California paid over $1.3 billion to the United States under the 1951 Agreement. (J.A. 51).

public interest and for a public purpose, the same is necessarily true of any taking. *Cf. Hawaii Housing Authority v. Midkiff*, —— U.S. ——, 104 S.Ct. 2321, 2329 (1984) (public use requirement of the Just Compensation Clause is coterminous with the scope of a sovereign's police powers). A public purpose alone—however laudable—does not allow the United States to repudiate its contracts.

III. A HEIGHTENED STANDARD OF REVIEW IS APPLICABLE TO THE GOVERNMENT'S REPUDIATION OF ITS OWN CONTRACTS

The Secretary devotes much of his brief to arguing the beneficial effects on the Social Security system of the 1983 Amendment. The argument misses the point. If we were dealing here with the impairment of a private contract by federal legislation, the appropriate inquiry would be whether "the legislature has acted in an arbitrary and irrational way." *National Railroad Passenger Corp.*, 105 S. Ct. at 1455. But as Justice Marshall noted in *National Railroad Passenger Corp.* (*id.* at 1455 and nn. 24-25), the allegation of a government's breach of its *own* contract presents a quite different matter.

Under the minimal standard of review proposed by the Secretary, no contract with the federal government would be worth the paper it is printed on. In *Lynch*, for example, it could surely have been concluded that the financial exigencies of the Depression justified reduction of some non-essential federal expenditures; it could hardly have been argued that war risk term insurance was central to the survival of the Republic. Indeed, it would be difficult to imagine a circumstance where *some* rational, non-arbitrary reason could not be offered for the repudiation of a contractual obligation by the federal government.[17]

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[17] *Cf. United States Trust Co.*, 431 U.S. at 26:

> A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State

Amici submit that here, as the Court suggested in *National Railroad Passenger Corp.*, a "heightened standard of review" must apply when the federal government repudiates its own contracts. The appropriate standard, we believe, is found in *United States Trust Co.*, which was decided in the context of a State's breach of its contractual obligations. There, the Court explicitly rejected the "invitation to engage in a utilitarian comparison of public benefit and private loss" in determining the legality, under the Contract Clause, of the State's repudiation of its promises. 431 U.S. at 29. Rather, such an impairment of the State's own contract could be sustained only "if that impairment was both reasonable and necessary to serve the admittedly important purposes claimed by the State." *Ibid.*

The *United States Trust Co.* test is applicable here.[18] Since the federal government's "self-interest is at stake" (*id.* at 26), Congress simply "is not completely free to consider impairing the obligations of its own contracts

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could reduce its financial expenditures whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

For similar reasons, a minimal standard of review does not apply under the Fifth Amendment to federal legislation repudiating government contracts. (*Id.* at 26 n.25, citing *Perry* with approval).

[18] This Court has suggested that the principles embodied in the Due Process Clause are not necessarily coextensive with those in the Contract Clause, and that, to the extent the standards differ, a less searching inquiry may be applicable in the review of federal economic legislation. *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, —— U.S. ——, 104 S.Ct. 2709 (1984); *Nat'l R.R. Passenger Corp.*, 105 S.Ct. at 1455 n.25. These statements, however, were made in the context of federal legislation that was alleged to have impaired private contracts, not contracts involving the United States as a party. As *National Railroad Passenger Corp.* suggests (citing *Lynch*, *Perry*, and *United States Trust Co.*), this standard of review is not necessarily applicable when a government impairs its own contractual obligations. *Id.* at 1455 nn.24-25. *See also United States Trust Co.*, 431 U.S. at 26 n.25.

on a par with other policy alternatives." *Id.* at 30-31. Rather, the appropriate inquiry is a "less drastic means" test; the burden is on the federal government to demonstrate that "an evident and more moderate course would [not] serve its purpose equally well." *Id.* at 31.

The Secretary makes no such contention here. Indeed, the 1983 Amendment itself plainly suggests several alternative approaches not involving the repudiation of the 1951 Agreement. In the case of federal employees, for example, the Amendment required that all *new* employees be enrolled in the system. (Pub. L. No. 98-21, § 191, 97 Stat. 67.) In the case of employees of nonprofit organizations, who, like the States, had contractual rights to withdraw from the system pursuant to agreements entered into after the 1950 Amendments, Congress simply chose to subject *all* such employees to coverage. (*Id.*, § 102(a)(1), 97 Stat. 70.) And the Secretary's own brief acknowledged that Congress could have simply "ignored the outstanding agreements" and instead enacted legislation subjecting all (or a specified subgroup) of the employees of state and local subdivisions to Social Security coverage. (U.S. Br. at 29.)

In short, it is uncontested that it was not necessary for Congress to repudiate the 1951 Agreement to achieve its goal of aiding the Social Security system financially. The fact that Congress could have reached the same end through permissible means hardly serves, as the Secretary suggests, to render "absurd" the argument that the federal government's repudiation of its contracts is constitutionally impermissible. (U.S. Br. at 30.) The Fifth Amendment—like much of the Constitution—is largely about *process*, not results. It is permissible under the Constitution to deprive a person of life, liberty, or property only after due process of law. Just as it is no answer to a valid Fifth Amendment claim in the criminal context to say that a fair trial would surely have produced the same result, it is no answer in this case for

the Secretary to contend that a different legislative approach might constitutionally lead to the same practical result. Indeed, because it is plain that it was not necessary for Congress to repudiate the 1951 Agreement in order to avoid financial loss to the system, its decision nonetheless to abrogate its agreements with the States is wholly indefensible.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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